03-1086

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RE: *Olstad v. Microsoft Corporation*
Case No. 03-1086

Dear Clerk:

Please be advised that the plaintiff-appellant in the above-referenced matter does not intend to file an additional brief in the Supreme Court. Pursuant to the Court's order dated March 23, 2004, we are enclosing 17 copies of the plaintiff-appellant's Brief and Required Short Appendix and Reply Brief as previously filed in the Court of Appeals.

If you have any questions, please contact me directly. Thank you for your attention to this matter.

Very truly yours,

McNALLY, MALONEY & PETERSON, S.C.

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JFM:GJP
Enclosures

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SUPREME COURT OF WISCONSIN

GENE OLSTAD, individually and
on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

Appeal No. 03-1086
Trial Court
Case No. 00CV3042

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100 inclusive,

Defendants-Respondents.

Appeal from the Circuit Court for Milwaukee County,
The Honorable Jeffrey A. Kremers Presiding

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STATEMENT OF ISSUES

Does Wisconsin's antitrust act, Wis. Stat. § 133.03, apply to out-of-state conduct that predominantly affects interstate commerce?

Answered by the trial court: No.

STATEMENT OF THE CASE

Plaintiff-Appellant Gene Olstad brought this action against Defendant-Respondent Microsoft Corporation, purporting to represent a class, as amended, comprised of Wisconsin consumers who acquired a license for MS-DOS, Windows or a version of Word, Excel or Office that runs on an Intel-compatible PC. (R. 68 at ¶ 8.) Olstad alleged that Microsoft violated Wisconsin's antitrust act, Wis. Stat. § 133.03, by illegally acquiring and maintaining, through a nationwide course of anticompetitive conduct, monopolies that permitted it to overcharge consumers of its operating systems and certain applications software. (R. 68 at ¶¶ 150-162.) Olstad also alleged that Microsoft violated Wisconsin's prohibition against fraudulent advertising, Wis. Stat. § 100.18(1), by deceiving consumers into believing that the prices for its products were established by competitive market forces.

Microsoft moved for summary judgment in 2002, asking the trial court to dismiss Olstad's complaint in its entirety. (R. 71; R. 72 at p. 10.) As to the fraudulent advertising claim, Microsoft argued that Olstad's complaint did not identify any deceptive statement in any advertisement, and that Olstad had admitted at deposition that he had not been deceived by anything in any advertisement. The trial court agreed with Microsoft and dismissed the claim. (R. 88 at p. 17.) Olstad did not appeal that dismissal.

With respect to Olstad's antitrust claim, Microsoft based its motion on long-established Wisconsin authority holding that Wis. Stat. § 133.03 does not apply to out-of-state conduct that predominantly affects interstate commerce. As Olstad's complaint acknowledges, Microsoft is neither organized nor incorporated under Wisconsin law nor does it have its principal place of business in Wisconsin. (R. 68 at ¶ 5.) Moreover, Olstad does not allege that Microsoft

unlawfully acquired or maintained monopoly power by engaging in unlawful conduct in Wisconsin. To the contrary, all of the conduct Olstad alleges to be anticompetitive -- such as Microsoft's alleged "domination and control" of the OEM channel (R. 68 at ¶ 64), its "predatory acts" directed at Digital Research's DR-DOS (R. 68 at ¶ 81), its "predatory campaign" to drive IBM's OS/2 from the operating systems market (R. 68 at ¶ 97), and its "abuse [ ] and leverage [ ]" of the Windows platform "to acquire and/or maintain monopoly power in certain applications software markets" (R. 68 at ¶ 130) -- occurred *outside* Wisconsin. Finally, the challenged conduct allegedly affected commerce that extends far beyond Wisconsin. Indeed, as Olstad acknowledges, Microsoft distributes its software on a worldwide basis. (R. 68 at ¶ 5.)

Agreeing with Microsoft, the trial court ruled that Wisconsin's antitrust act does not apply to the conduct

alleged here and that Olstad's antitrust claim should therefore be dismissed. (R. 88 at p. 18.)

Microsoft also argued that Olstad's claims should be dismissed because he had suffered no injury as a consequence of the alleged overcharge. (R. 77 at p. 3.) Indeed, Olstad twice testified at his deposition, "I don't think I was overcharged." (R. 77: Tab A at p. 38.)

Here too the trial court agreed with Microsoft:

> More importantly, as far as I'm concerned, I just don't think Mr. Olstad is a proper plaintiff to put forth these claims. I read his deposition transcript. I read it about four times, because I frankly had trouble understanding why he was the plaintiff in this case. What his, what harm he was claiming to have suffered and I don't see it. . . . Do I think there is a plaintiff out there in Wisconsin? Well, under my view of the world with respect to *Pulp Wood*, I don't think there is. But certainly not Mr. Olstad.

(R. 88 at pp. 17-18.)

Olstad now appeals the dismissal of his antitrust claim.[1]

ARGUMENT

I. Introduction

From the *Pulp Wood* case in 1914 through the *Conley Publishing* case in 2003, this Court has stated repeatedly that Wisconsin's antitrust law applies only to intrastate commerce. That is indeed the correct interpretation of the Legislature's intention when it enacted that statute in 1893. In addition, once rendered, this Court's interpretation became the law and was subject to change only by the Legislature itself. The Legislature, however, has chosen over the last 90 years to

[1] Whether Wisconsin's antitrust statute reaches interstate commerce is also at issue in *Capp v. Microsoft Corp.*, No. 03-1600. The plaintiffs in *Capp* allege materially identical facts to those here, and just as in *Olstad*, Microsoft moved to dismiss *Capp* on the grounds that Wisconsin's antitrust statute does not reach out-of-state conduct that predominantly affects interstate commerce. The Dane County trial court denied Microsoft's motion. District IV of the Court of Appeals granted Microsoft's petition for leave to appeal, but then stayed briefing pending the resolution of *Olstad*. Likewise, the jurisdictional scope of our antitrust statute is also at issue in *Szukalski v. Crompton Corp.*, No. 03-3132 and *Meyers v. Bayer AG*, No. 03-2840, which are also stayed before the Court of Appeals pending the resolution of *Olstad*.

leave undisturbed this Court's pronouncement in 1914 in the *Pulp Wood* case, and there is good reason not to alter it.

Olstad's lawsuit was properly dismissed.

II. Wisconsin Appellate Courts -- Including This Court in 2003 -- Have Repeatedly Stated That Wisconsin's Antitrust Act Is Limited To Intrastate Transactions.

It has long been the law in Wisconsin that our state's antitrust statutes apply only to alleged unlawful acts that occur in Wisconsin. Only last summer, this Court noted that "[t]he dearth of state antitrust precedent is not surprising because the scope of Chapter 133 is limited to intrastate transactions." *Conley Publishing Group, Ltd. v. Journal Communications, Inc.*, 2003 WI 119, ¶ 16, 665 N.W. 2d 879, 885 (2003).

This has been Wisconsin law since 1914, when this Court ruled in *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), that our antitrust

act "applies to attempts to monopolize trade and commerce *within the state . . . .*" *Id.* at 625 (emphasis added). Indeed, *Conley Publishing* is only the latest in a long line of authority from this Court and the Court of Appeals that has consistently confirmed *Pulp Wood*'s holding:

> We have repeatedly stated that sec. 133.01, Stats., was intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890, 15 U.S.C. secs. 1 and 2, *with application to intrastate as distinguished from interstate transactions . . . . Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W. 2d 473, 480 (1980) (emphasis added).
>
> The parts of [Section 133.01(1)] making a conspiracy in restraint of trade a crime and illegal . . . *applies to intrastate instead of interstate transactions . . . . John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 410, 198 N.W. 2d 363, 367 (1972) (emphasis added).
>
> Sec. 133.01, Stats., has been held by this court to be a reenactment of the first two sections of the federal Sherman Anti-trust Act, *with application to intrastate as distinguished from interstate transactions . . . . Reese v. Associated Hospital Service, Inc.*, 45 Wis. 2d 526, 532, 173 N.W. 2d 661, 664 (1970) (emphasis added).

> In the first Pulp Wood case it is pointed out that section 133.01 is a mere reenactment of the first two sections of the Sherman Anti-Trust Act, *with application to intrastate as distinguished from interstate transactions . . . . State v. Lewis & Leidersdorf Co.*, 201 Wis. 543, 230 N.W. 692, 694 (1930) (emphasis added).
>
> [S]ec. 133.03(1) and (2), Stats., . . . were "intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890, 15 U.S.C. secs. 1 and 2, *with application to intrastate as distinguished from interstate transactions . . . .*" *American Medical Transport, Inc. v. Curtis-Universal, Inc.*, 148 Wis. 2d 294, 299, 435 N.W. 2d 286, 288-89 (Ct. App. 1988) (emphasis added), *rev'd on other grounds*, 154 Wis. 2d 135, 452 N.W. 2d 575 (1990).
>
> The federal antitrust law, the Sherman Act, applies to interstate commerce, *while the state law applies to intrastate commerce. Independent Milk Producers Co-Op v. Stoffel*, 102 Wis. 2d 1, 6-7, 298 N.W. 2d 102, 104 (Ct. App. 1980) (emphasis added).

Throughout this litigation, Olstad has offered a number of arguments why these eight appellate decisions -- rendered from 1914 to 2003 -- can be ignored. All of those arguments are without merit.

III. The Supreme Court In *Pulp Wood* Plainly Interpreted Wisconsin's Antitrust Act Not To Apply To Interstate Commerce.

Olstad has argued that *Pulp Wood* did "not bar[] the application of the state's antitrust statute [to interstate acts], but merely [chose] to apply the federal statute even though both applied." Brief of Plaintiff-Appellant at 17.[2] This reading of *Pulp Wood* is incorrect. *Pulp Wood* arose out of a series of contracts to supply a paper mill with raw materials. 157 Wis. at 615. When the supplier sued for payment under the contracts, the paper mill argued that the contracts were void under the federal and state antitrust statutes. *Id.* In relevant part, this Court held:

> The complaint shows that the wood supply furnished to the plaintiff came from the states of Wisconsin, Minnesota, and Michigan, and the Dominion of Canada. *The contract we think involved interstate commerce, and if so the*

[2] Because Olstad has chosen not to file a separate brief in the Supreme Court, all references to Brief of Plaintiff-Appellant are to Olstad's brief filed in the Court of Appeals.

> *federal statute is applicable* and the case will be treated on that basis.
>
> * * *
>
> Section 1747e, Stats. of Wisconsin, is a copy of the federal statute, except that it *applies to attempts to monopolize trade and commerce within the state* . . . .

Id. at 615, 625 (emphasis added). After remand for further proceedings, the action reached this Court again in *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 168 Wis. 400, 170 N.W. 230 (1919), at which time the Court summarized its previous holding:

> [T]he principles of law then laid down . . . may be briefly stated as follows . . . . The contract in question involved interstate commerce, and hence the federal statute is the statute to be applied to the case . . . .

168 Wis. at 404. Clearly the Court did not consider itself free to apply either statute. *Because* the case involved *interstate* commerce, the federal statute was "the statute to be applied." *Id.*

IV. This Court's Holding In *Pulp Wood* Is Consistent With The Legislature's Intent When It Enacted Wisconsin's Antitrust Act.

Olstad has also argued that changes in how the Commerce Clause of the United States Constitution has been interpreted have somehow nullified *Pulp Wood*'s holding. Brief of Plaintiff-Appellant at 24. This is also incorrect.

Olstad states that "[t]he *Pulp Wood* case is one of those early state cases that were decided when the dichotomy between intrastate and interstate was clear." Brief of Plaintiff-Appellant at 24. True -- but the fact that federal constitutional law of the early twentieth century would not permit a state to regulate interstate commerce only reinforces that this Court meant what it said in *Pulp Wood*: federal antitrust law governs *inter*state transactions, and Wisconsin antitrust law reaches only *intra*state transactions.

Moreover, in holding as it did in *Pulp Wood* that Wisconsin's antitrust law applies to intrastate transactions,

this Court correctly identified the Legislature's intent when it enacted that law. As this Court has explained, "[t]he cardinal rule in statutory interpretation is to discern the intent of the legislature," *State v. Rosenburg*, 208 Wis. 2d 191, 194, 560 N.W. 2d 266, 267 (1997), and a "statute must be interpreted with knowledge of conditions existing at the time it was enacted." *Shinners v. State ex rel. Laacke*, 261 N.W. 880, 883, 219 Wis. 23 (1935). Wisconsin's antitrust statute was enacted in 1893, three years after the federal Sherman Act was adopted. The conditions at that time -- in particular the jurisdictional division of labor between the states and the federal government -- were well described by Senator Sherman himself:

> [The Sherman Act] does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State of the Union are now, by common or statute law, null and void. Each state can and

> does prevent and control combinations *within the limit of the State*. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set such combinations as I shall hereafter show, *but these courts are limited in their jurisdiction to the State*, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.
>
> * * *
>
> The State courts have held in many cases that they can not interfere in controlling the actions of corporations of other States. Corporations from other States do business within a state, the courts may control their action *within the limits of the State*, but when a trust is created by a combination of many corporations from many States, there are no courts with jurisdiction broad enough to deal with them except the courts of the United States.

21 Cong. Rec. 2456, 2460 (1890) (emphasis added). The House Report on the Sherman Act further explained the constitutional limits then applicable to state antitrust laws:

> Congress has no authority to deal, generally, with the subject within the States, and *the States have no authority to legislate in respect of commerce between the several States or with foreign nations.*

> It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value *unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority*.

H.R. Rep. No. 1707, 51st Cong. 1st Sess., 1 (1890) (emphasis added). Given the historical context in which it acted, the Wisconsin Legislature's intent when it adopted our state's antitrust law can only have been to regulate anticompetitive acts occurring *in this state*. And that is the "principle of law" this Court applied in *Pulp Wood*.

Antitrust statutes enacted in other states in the same era as the Wisconsin act have similarly been interpreted to be limited to intrastate commerce. For example, the Illinois Supreme Court held that the state's antitrust statute is violated only

> by performing some one or more of the acts therein prohibited within the state of Illinois, and would not include, but would exclude, all acts which would connect [the defendant] with any trust, pool, combination, etc., formed outside of the state, and which would violate the anti-trust statute of the United States.

People ex rel. Akin v. Butler Street Foundry & Iron Co., 66 N.E. 349, 353 (Ill. 1903). Likewise, the Ohio Supreme Court explained that the purpose of the state's antitrust law is "to prevent . . . restraint of trade . . . and to provide for the punishment of persons restraining `free competition in commerce and all classes of business *in the state'*." *Columbus Packing Co. v. State ex rel. Schlesinger*, 140 N.E. 376, 378 (Ohio 1922) (emphasis added). The Kansas Supreme Court similarly stated:

> It is a conclusive presumption of the law that this court knew that *the legislature of this state had no power to regulate interstate commerce,* and the presumption is equally strong and conclusive *that by the use of the word "trade" the intercourse between citizens of different*

> *states that constitutes interstate commerce was not in contemplation.*

State v. Phipps, 31 P. 1097 (Kan. 1893) (emphasis added).

These holdings have been reaffirmed over the years. In Illinois, for example, both the intermediate appellate court and the United States Court of Appeals held in the 1950s and 1960s that the Illinois antitrust law "is applicable only to intrastate commerce." *Vendo Co. v. Stoner*, 245 N.E. 2d 263, 281 (Ill. App. 1969) (quoting *Kosuga v. Kelly*, 257 F. 2d 48, 55 (7th Cir. 1958), *aff'd*, 358 U.S. 516 (1959)). An Ohio court explained in the 1960s that "[b]y the Sherman Act . . . restraint of trade in interstate commerce [was] made illegal," and Ohio's antitrust law "did the same for intrastate commerce in Ohio." *Bulova Watch Co., Inc. v. Ontario Store of Columbus, Ohio, Inc.*, 176 N.E. 2d 527, 528 (Ohio Ct. of Common Pleas 1961). This is still the law in Ohio, as the leading treatise reports: "While a state may enact antitrust

legislation affecting intrastate commerce, the Ohio laws generally do not apply to interstate transactions." 88 Ohio Jur. 3d Trade Regulation §16 (2003).

Likewise, in two recent cases, the Alabama Supreme Court reaffirmed its 1930 holding that Alabama's antitrust laws apply only to intrastate transactions and do not provide a cause of action for damage incurred within Alabama resulting from anticompetitive conduct that occurred outside the state. In the first case, *Abbott Laboratories v. Durrett*, 746 So. 2d 316 (Ala. 1999), the complaint alleged a conspiracy among out-of-state corporations to control the price of brand-name prescription drugs that were shipped from out-of-state into Alabama. The defendants were granted judgment on the pleadings. The Alabama Supreme Court affirmed, finding that there was

> a strong presumption that the Alabama Legislature was aware toward the end of the 19th century and at the beginning of the 20th

> century, when it first enacted these antitrust statutes, that its ability to regulate antitrust activity was limited in that it did not have the power to directly regulate transactions involving interstate commerce.

Id. at 338. The court also considered whether the legislature's original intent should be overridden in light of changing views under federal law as to the limits of state power. The court stated that such an expansion of the original intent of the statute to broaden its scope was a decision properly reserved to the legislature and was not a matter within the court's judicial mandate. According to the court, a statute

> does not expand like an accordion with changes in federal law bearing on the Legislature's power. Instead, we are concerned only with whether the Legislature, when it enacted the [state antitrust statute], contemplated that it would apply to . . . agreements [to control the price of goods shipped through interstate commerce].

Id. at 318. In holding that the original scope of the state antitrust statute was limited to intrastate conduct and that it

could therefore not be used to challenge conduct that occurred outside the state, the court concluded:

> This Court's role is not to displace the legislature by amending statutes to make them express what we think the legislature should have done. Nor is it this Court's role to assume the legislative prerogative to correct defective legislation or amend statutes.

Id. at 339 (internal quotation marks omitted).

In the second case, *Archer Daniels Midland Co. v. Seven-Up Bottling Co.*, 746 So. 2d 966 (Ala. 1999), the Alabama Supreme Court reiterated (1) that the changing interpretation of the Commerce Clause does not warrant a change in a judicial interpretation of a state antitrust statute that predates the change in Commerce Clause interpretation; and (2) that it is up to the legislature to make such a change:

> [T]he field of operations of Alabama's antitrust statutes . . . is no greater today than it was when the laws were first enacted. Thus, these statutes regulate monopolistic activities that occur "within this state" -- within the geographic boundaries of this state -- even if such activities

> fall within the scope of the Commerce Clause of the Constitution of the United States. We leave to the Legislature the policy decision of whether to expand the reach of Alabama's antitrust statutes to activities that cross state boundaries.

746 So. 2d at 989-90.[3]

And finally, last summer United States District Judge Motz, in the federal multidistrict litigation involving Microsoft, reasoned with regard to Mississippi's antitrust statute:

> [T]he issue presented in this case is not whether *today* the State of Mississippi could constitutionally enact legislation that prohibits interstate anticompetitive conduct affecting intrastate commerce within Mississippi, regardless of how and where the means of effecting the illegal conduct are carried out. The issue is whether the legislature intended to do so *when it enacted the [Mississippi Antitrust Act]*.

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[3] These two decisions by the Alabama Supreme Court make short work of Olstad's reliance on *In re Name Prescription Drugs Antitrust Litigation*, 123 F. 3d 599 (7th Cir. 1997). Brief of Plaintiff-Appellant at 15. In that case the Seventh Circuit had relied on the changing interpretation of the Commerce Clause to construe Alabama's antitrust statute as reaching interstate commerce. As indicated, the Alabama Supreme Court subsequently rejected the Seventh Circuit's analysis.

In re Microsoft Corp. Antitrust Litigation, MDL No. 1332, 2003 WL 22070561, at *2 (D. Md. Aug. 22, 2003) (emphasis added). Judge Motz concluded that the Mississippi Legislature had no such intent.

V. Once A Statute Has Been Construed By The Court It Is Not Open To Subsequent Reconstruction; It Is For The Legislature To Act If It Disagrees With The Court's Interpretation.

The Legislature's intent when it adopted Wisconsin's antitrust law in 1893 was to fill a jurisdictional gap. As Senator Sherman explained, the federal Sherman Act regulated interstate conduct but would not reach into the states to regulate intrastate conduct. The Wisconsin antitrust act was adopted to do precisely that in our state. It was not the Legislature's intent to duplicate the coverage of the Sherman Act in view of the fact that state regulation of interstate commerce was then understood to be beyond the

states' powers. This Court's holding in *Pulp Wood* is an accurate interpretation of legislative intent.

Olstad has argued that *Pulp Wood* can be repudiated on the grounds that (1) over the years federal commerce clause jurisprudence has changed, and (2) public policy demands such a repudiation. Even if these were persuasive grounds for changing Wisconsin law -- and, as explained elsewhere, they are not -- such a decision belongs to the Legislature:

> It has often been said that *once a construction has been given to a statute, the construction becomes part of the statute; and it is within the province of the legislature alone to change the law* . . . . Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts' construction is not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged; for *the principle of the courts' decision -- legislative intent -- is a historical fact and, hence, unchanging.* Thus, when the legislature acquiesces or refuses to

> change the law, it has acknowledged that the courts' interpretation of legislative intent is correct. This being so, however, the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function.

Zimmerman v. Wisconsin Electric Power Company, 38 Wis. 2d 626, 633-34, 157 N.W. 2d 648, 651 (1968) (emphasis added). The Court has recently reaffirmed the validity of these principles:

> Construction given to a statute by the supreme court becomes part of the statute unless the legislature subsequently amends the statute to effect change . . . The court's construction of a statute will stand unless the legislature specifically changes the particular holding.

Rosenberg, 208 Wis. 2d at 196, 198, 560 N.W. 2d at 268, 269. Indeed, the rule that a court's construction will stand applies even in cases where the interpretation placed on a statute by the court appears "somewhat strained." *State ex rel. LaFollette v. Circuit Court of Brown County*, 37 Wis. 2d 329, 341, 155 N.W. 2d 141, 147 (1967) (stating that even if

the Court deemed it desirable to change its interpretation of a statute, it "would not feel at liberty" to do so). Similarly, a construction will stand even though members of a later panel see "substance in the argument" that the statute could be interpreted another way:

> If this issue of statutory construction were before us for the first time, there are those joining this opinion who see substance in the argument [for a particular construction]. However, a different construction has [already] been given . . ., and where a statute has been construed by this court, changes in the application of the statute are to be made by the legislature, not by a subsequent court in a later case.

Bischoff v. City of Appleton, 81 Wis. 2d 612, 616-17, 260 N.W. 2d 773, 775 (1978). Neither public policy nor changed social conditions can justify judicial reconstruction of a statute already interpreted:

> In [two earlier cases], this court was construing a statute. It was not determining what the appropriate public policy in the area of concern ought to be. It was not stating what it felt the

> law ought to be or provide. Rather, it was determining what the legislature intended when it enacted the statute involved. It was the legislative intent that was located, not the will or wishes of the court. Once a statute has been thus construed, it is not open to subsequent reconstruction . . . . The argument that changed social conditions call for a changed public policy must be addressed to the legislature, not to the courts. Parties may call for a change in the law but they cannot call for a change in the construction or interpretation given a particular legislative enactment, where the legislature has elected not to change it.

Kramer v. City of Hayward, 57 Wis. 2d 302, 313-314, 203 N.W. 2d 871, 877 (1973).

VI. *Pulp Wood* Was Not Overruled In The 1960s.

Olstad has also argued that *Pulp Wood* was overruled by two cases from the 1960s: *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W. 2d 133 (1960), and *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1 (1966). This argument is wrong for three reasons.

First, as discussed above, any such judicial reconstruction of the law established in *Pulp Wood* would

violate the important principle that, once a statute has been construed, it is not open to subsequent judicial reconstruction.

Second, the notion that *Pulp Wood* was overruled in the 1960s is impossible to reconcile with this Court's decisions in the 1970s and 1980s -- and in *Conley Publishing* in 2003 -- that reiterated *Pulp Wood's* holding. *See supra* pp. 6-8.

Third, Olstad misreads the two cases he relies on. Far from repudiating *Pulp Wood*, both *Allied Chemical* and *Milwaukee Braves* in fact confirm its holding.

In *Allied Chemical*, the State of Wisconsin alleged that defendants had "combin[ed] and conspir[ed] in restraint of trade and in establishing uniform prices at which [calcium chloride was] sold to Milwaukee county and other users thereof in Wisconsin . . . ." 9 Wis. 2d at 291. Importantly -- and unlike Olstad's complaint -- the complaint in *Allied Chemical* further alleged "that some of the acts by the

defendants in furthering said combination and conspiracy *were performed by them in the state of Wisconsin.*" *Id.* (emphasis added). Nonetheless, the trial court granted the defendants' motion for summary judgment on federal preemption grounds, agreeing that "since the federal trade commission has taken jurisdiction over practices which the state by this action seeks to deal with, the state is precluded from enforcing the state statutes . . . ." *Id.* at 293.

This Court reversed, holding that federal law did not preempt the application of Wisconsin's antitrust act. *Id.* at 295. Significantly, the Court invoked *Pulp Wood's* holding, stating that "[t]he Wisconsin [antitrust] statutes make no attempt to regulate or burden interstate commerce." *Id.* Having held that federal preemption was inapplicable, the Court further held that "if the state is able to prove the allegations made in its complaint" -- including that "some of the acts by the defendants . . . *were performed by them in the*

state of Wisconsin" -- then "[t]he people of Wisconsin are entitled to the advantages that flow from" the protections provided by the Wisconsin antitrust statute. *Id.* at 291, 295 (emphasis added).

The other case from the 1960s -- *Milwaukee Braves* -- never even commented on, let alone overruled, *Pulp Wood's* holding. *Milwaukee Braves* was also a case about federal preemption, and the Court there held that, to the extent Wisconsin's antitrust act might otherwise reach conduct by major league baseball, it is preempted by federal law that affords baseball an exemption from antitrust laws generally. 31 Wis. 2d at 730-32. The Court never reached the issue of whether the defendants' conduct violated Wisconsin's antitrust act, stating only that "we *assume*, at this point, that a violation of Wisconsin law has occurred *if our law can be applied*." *Id.* at 719 (emphasis added). Moreover, in *Milwaukee Braves* -- unlike here -- some of the allegedly

wrongful conduct took place in Wisconsin in view of the allegation that the defendants formulated and carried out "a plan" to abolish "the playing and exhibition of Major League baseball games in Milwaukee." *Id.* at 708; *accord id.* at 720 (noting that defendants' conduct "involves activity within Wisconsin").

VII. The Wisconsin Legislature Has Not Acted To Overrule Pulp Wood.

Only the Legislature could overrule *Pulp Wood's* holding that Wisconsin antitrust law applies to intrastate, not interstate, transactions -- and the Legislature has not done so.

Olstad has argued that *Pulp Wood* was overruled by the 1980 amendments to Wisconsin's antitrust act. But even the *Emergency One* court -- which "reviewed the entire Legislative Council bill file for 1979 Assembly Bill 831[,] eventually passed as the amended Chapter 133, with some changes" -- rejected the argument that the 1980 amendments

were intended to expand the reach of the act. *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F. Supp. 2d 959, 963-64 (E.D. Wis. 1998). And both this Court and the Court of Appeals, in *Conley Publishing*, *Grams*, and *American Medical Transport* -- all of which were decided after the effective date of the 1980 amendments -- have implicitly rejected this argument.

Indeed, neither the text of the 1980 amendments nor their legislative history even mentions *Pulp Wood*, let alone evinces any intent to overturn this Court's longstanding interpretation of Wisconsin's antitrust act. If the Legislature had intended such a fundamental change to established law, that intent would have been expressly stated. *Guse v. A.O. Smith Corp.*, 260 Wis. 403, 406, 51 N.W. 2d 24, 26 (1952) (stating that "revisions of statutes do not change their meaning unless the intent to change the meaning necessarily and irresistibly follows the changed language"); *see also*

Pierce v. Underwood, 487 U.S. 552, 567-68 (1988) (rejecting proposed change in interpretation of statute where a subsequent congressional amendment failed expressly to adopt a change because "only the clearest indication of congressional command would persuade us to adopt a test so out of accord with prior usage").[4]

Here, however, the text of the 1980 amendments makes no change to the act's basic prohibition, thus compelling the conclusion that the Wisconsin Legislature did not intend to alter the long-standing interpretation of the statute. *See Tucker v. Marcus*, 142 Wis. 2d 425, 434, 418 N.W. 2d 818, 821 (1988) (stating that "there is a presumption that where the legislature substantially reenacts a statute it adopts [the] construction previously placed on that

[4] For example, when the Illinois legislature decided to overrule case law holding that Illinois's antitrust act applied only to intrastate commerce, it did so by passing a bill expressly providing that "[n]o actions under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce." 740 Ill. Comp. Stat. 10/7.9 (2002).

statute . . . ."); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (stating that the legislature is presumed to have incorporated the judicial gloss on unamended portions of otherwise amended statute). Moreover, the Wisconsin Legislative Reference Bureau's analysis of the 1980 amendments, which details the changes that were intended by the legislation, never even mentions *Pulp Wood* nor suggests any intent to broaden the jurisdictional scope of Wisconsin's antitrust act.

In light of our appellate courts' continued adherence to long-standing precedent and the total absence of any reference to that precedent in either the text or legislative history of the 1980 amendments, it is not possible to read the rejection of *Pulp Wood* and its progeny into either the vaguely worded statement of legislative intent included with the 1980 amendments or the *Illinois Brick* "repealer."

Indeed, as for the statement of legislative intent, courts have emphasized that similar language in earlier versions of

Wisconsin's antitrust act did not extend the act beyond its intended scope: "While § 133.27 provides that §§ 133.17 and 133.185 shall be liberally construed so that their purposes may be subserved, that does not mean that a remedy, not provided in the statutes, will necessarily be read into them." *Chapiewsky v. G. Heileman Brewing Co.*, 297 F. Supp. 33, 40 (W.D. Wis. 1968). Indeed, this Court recently characterized the statement of legislative intent as nothing more than a "hortatory statement[]" that "offer[s] little help" in determining the scope of the antitrust act. *Conley Publishing*, 2003 WI 119, ¶ 24.

Nor did the *Illinois Brick* "repealer" expand the antitrust act's jurisdictional scope. The "repealer" addressed an issue that arose when, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the United States Supreme Court held that the federal antitrust laws do not allow recovery by indirect purchasers. Since Wisconsin courts have traditionally looked

to federal decisions for guidance in interpreting Wisconsin's antitrust act, the Legislature was concerned that *Illinois Brick* would deny a cause of action under state law to indirect purchaser victims of intrastate anticompetitive activity. To avoid this, the Legislature included an *Illinois Brick* "repealer" as part of the 1980 amendments to Chapter 133. The "repealer" consists of the three words -- "directly or indirectly" -- in Wis. Stat. § 133.18(1)(a), and nothing about it affects *Pulp Wood*. To the contrary, the repealer provided Wisconsin indirect purchasers a cause of action for unlawful *intrastate* conduct, *see, e.g., Obstetrical & Gynecological Associates v. Landig*, 129 Wis. 2d 362, 371, 384 N.W. 2d 719, 723-24 (1986), but did nothing more. Indeed, the fact that the Legislature expressly circumvented *Illinois Brick* only underscores the significance of its silence with respect to *Pulp Wood*.[5]

[5] Moreover, it was sound public policy for the Legislature, when it enacted the

(continued on next page)

VIII. A Federal Court's Construction Of Wisconsin's Antitrust Act Is Not Binding Here.

In 1998, the United States Department of Justice and a number of state attorneys general, including Wisconsin's, brought antitrust claims against Microsoft in federal court. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part,* and *remanded in part,* 253 F. 3d 34 (D.C. Cir.), *cert. denied,* 534 U.S. 952 (2001), *opinion on remand and final judgment sub nom. New York v. Microsoft Corp.*, 224 F. Supp. 76 (D.D.C. 2002) (appeal pending) ("government action"). Olstad argues that the U.S.

"repealer," not to extend its reach to interstate conduct and, thus, conduct that is also subject to federal antitrust law. If the Legislature had so extended the reach of our antitrust act, then defendants would be exposed to the prospect of multiple liability. Specifically, defendants would face liability under federal antitrust law to direct purchases for the full amount of an alleged overcharge and would also face liability under state law to downstream indirect purchasers for the very same alleged overcharge. This is because under federal antitrust law, except in the rarest of circumstances, a defendant sued by direct purchasers may not, as a matter of law, attempt to prove that the direct purchasers' damages should be reduced to reflect the fact that they have successfully passed the overcharges on to indirect purchasers. *Illinois Brick*, 431 U.S. at 730. The defendant remains liable to the direct purchasers for the full amount of the overcharge -- even if indirect purchasers permitted to proceed under state law could later prove that all of the overcharge was passed on to them and, thus, could recover on that same overcharge. This is precisely the situation Microsoft would be facing if the Legislature had extended the reach of our antitrust act.

District Court in the District of Columbia determined in the government action that Microsoft had violated Wisconsin's antitrust act and that the trial court here erred by failing to give preclusive effect to that determination.

The federal court's decision did not, however, preclude the trial court from dismissing Olstad's complaint. First, a federal court's decision as to the jurisdictional reach of Wisconsin's antitrust act is not binding on Wisconsin courts. Second, in the government action, because the Wisconsin attorney general explicitly sought the same remedy as did the Department of Justice under federal law, Microsoft did not have sufficient incentive to litigate the construction of

Wisconsin's antitrust act such that the federal court's decision on this issue should be entitled to preclusive effect.[6]

A. A Federal Court's Construction Of Wisconsin's Antitrust Act Is Not Binding On A Wisconsin Court.

It is well-settled that a federal court's interpretation of Wisconsin law is not binding on Wisconsin courts. *Harvest States Cooperatives v. Anderson*, 217 Wis. 2d 154, 161 n. 5, 577 N.W. 2d 381, 384 n. 5 (Ct. App. 1998) (citing *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 394, 399, 573 N.W. 2d 842, 844 (1988)). Accordingly, "[a] federal decision

[6] In any event, the issue actually decided in the government action was not identical to the dispositive issue that the trial court decided in dismissing Olstad's complaint. Issue preclusion is appropriate only when the issue sought to be precluded is "identical" to that actually decided in the prior litigation. *May v. Tri-County Trails Commission*, 220 Wis. 2d 729, 734, 583 N.W. 2d 878, 880 (Ct. App. 1998); *see also Page K.B. v. Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W. 2d 370, 374 (1999) (stating that issue preclusion applies only to those issues that have been actually litigated and decided); *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W. 2d 723, 727 (1995) (same). In the government action, the D.C. District Court nowhere addressed the issue of whether intrastate *conduct* is a required element of liability under Wisconsin's antitrust act. Instead, it focused on whether there were *effects* in Wisconsin caused by Microsoft's conduct outside Wisconsin. *Microsoft Corp.*, 87 F. Supp. 2d at 55. By contrast, it was the issue of the scope or situs of the allegedly anticompetitive conduct that was the basis on which the Wisconsin trial court granted summary judgment to Microsoft: "But the bad acts didn't occur here and I think they have to, to bring a claim under Wisconsin anti-trust law." (R. 88 at p. 18; *see also* R. 88 at pp. 5-6, 9-10.)

based on a federal construction of state law may not preclude reconstruction of the law by that state's own courts." 18 *Moore's Federal Practice* § 133.14[1] (3d ed. 2002); *see, e.g., Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 941 P. 2d 1321, 1343 (Kan. 1997) (declining to preclude state court determination of state law issue that had been previously determined by a federal court and noting that "[a]ny suggestion that this court is precluded from deciding a question of our state law is without merit"); *Green v. Santa Fe Industries, Inc.*, 514 N.E. 2d 105, 109 (N.Y. 1987) (stating that "applying res judicata here would result in imposing the Federal legal determination in a State court . . . [and] would not only foreclose the [defendants] from presenting their theory in a different forum; it would prevent our court from considering the applicable rule and performing our function as a court of law . . . .").

This principle applies with even more force here, where the federal court at issue sits not in Wisconsin nor even in the Seventh Circuit and, therefore, lacks any expertise in Wisconsin law. *Cf. Restatement (Second) of Judgments* § 28(3)(1982) ("[R]elitigation of the issue in a subsequent action between the parties is not precluded [where] . . . [a] new determination of the issue is warranted . . . by factors relating to the allocation of jurisdiction between [the two courts]. . . .").[7]

Moreover, a federal court's decision on state law is particularly undeserving of preclusive effect where, as here, the federal court's decision contradicts holdings of the state's own appellate courts. For example, in *Chicago Truck Drivers, Helpers and Warehouse Union (Independent)*

[7] The Wisconsin Supreme Court and the state's other appellate courts have often relied upon the *Restatement (Second) of Judgments*, at times adopting its provisions wholesale. *See, e.g., Michelle T. v. Crozier*, 173 Wis. 2d 681, 688 n. 7, 689 n. 10, 495 N.W. 2d 327, 330 n. 7, 331 n. 10 (1993); *DePratt v. West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 311-12, 334 N.W. 2d 883, 886 (1983); *Portage County Bank v. Deist*, 159 Wis. 2d 793, 798-99, 464 N.W. 2d 856, 859 (Ct. App. 1990).

Pension Fund v. Century Motor Freight, Inc., 125 F. 3d 526, 531-32 (7th Cir. 1997), the United States Court of Appeals for the Seventh Circuit found preclusion inappropriate because (1) the issue to be precluded was a "purely legal question," (2) all indications suggested that the court that issued the decision giving rise to preclusion -- the "first court" -- did not correctly decide the issue, because the issue had not been "fully briefed in the first case," no court concurred with the first court, and the first court failed to distinguish contrary authority, and (3) the first court was not charged with the responsibility of developing the law in the jurisdiction.

Each of the factors relied upon in *Chicago Truck Drivers* applies to the federal decision at issue here. Whether Wisconsin's antitrust act reaches out-of-state conduct that is predominantly interstate in its effects is "a purely legal question." The parties' briefing on this issue before the

federal court was cursory and, for the reasons detailed elsewhere in this brief, the federal court's conclusion was flatly wrong. Notably, at a point in time when not a single Wisconsin appellate court had applied Wisconsin's antitrust act to interstate commerce, the federal court made no effort at all to distinguish *Pulp Wood* or its progeny. Finally, a federal district court is not charged with developing state law, but with interpreting it in accord with the state's highest court. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or

restricted.").[8]

[8] Beyond the general principle that "a federal construction of state law may not preclude reconstruction of the law by that state's own courts," 18 *Moore's Federal Practice* § 133.14[1], there are at least three reasons for not affording preclusive effect to a federal court's interpretation of state law where that interpretation bears indicia of being incorrect.

First, one of the primary rationales for issue preclusion is the "underlying confidence" that the first decision was "substantially correct." *Restatement (Second) of Judgments* § 29 cmt. f. But "[w]here a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. . . . That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary." *Id.*

Second, where just such a questionable determination of state law is rendered by a federal court, preclusion is particularly inappropriate because it would "foreclose[ ] [the state court] from an opportunity to reconsider the applicable rule, and thus to perform its function of developing the law," a "consideration [that] is especially pertinent when there is a difference in the forums in which the two actions are to be determined." *Id.* at § 29 cmt. i.

Third, by reconsidering a federal court's erroneous interpretation of state law, our courts avoid the inequitable administration of the laws that would result from subjecting Microsoft to one interpretation of our antitrust act while all other antitrust defendants benefit from a differing interpretation. *Chicago Truck Drivers*, 125 F. 3d at 532 ("'It would manifestly be unjust to apply one rule of law forever as between the parties and to apply a different rule as to all other persons.'"); *Restatement (Second) of Judgments* § 28(2)(b) ("[R]elitigation of the issue . . . is not precluded [where] . . . [t]he issue is one of law and . . . a new determination is warranted in order . . . to avoid an inequitable administration of the laws . . . ."); *id.* at § 28 cmt. c ("[T]he outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards.") This is not a hypothetical concern. There are at least two other cases now pending in the Court of Appeals that do not involve Microsoft and in which the defendants successfully advanced, in the trial court, the same interpretation of Wisconsin's antitrust act that Microsoft urges here. *See Meyers v. Bayer AG*, No. 03-2840; *Szukalski v. Crompton Corp.*, No. 03-3132.

B. Microsoft Had Little Incentive To Litigate The Reach Of Wisconsin's Antitrust Act In The Government Action.

In the government action, the reach of Wisconsin's antitrust act was a collateral issue which Microsoft had little incentive to litigate. Yet "among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had . . . an adequate incentive to litigate 'to the hilt' the issues in question." *Prosise v. Haring*, 667 F. 2d 1133, 1141 (4th Cir. 1981), *aff'd*, 462 U.S. 306 (1983); *see also Michelle T.*, 173 Wis. 2d at 688-89. In making this determination, courts consider the "realities of the prior litigation, including the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *In re Sokol*, 113 F. 3d 303, 307 (2d Cir. 1997) (alterations and quotation marks omitted); 18 Wright, Miller & Cooper,

Federal Practice and Procedure § 4421, at 542 (2d ed. 2002) (no preclusion where "the matters had 'come under consideration only collaterally or incidentally'").

In the government action, there was no incentive to litigate "to the hilt" the reach of Wisconsin's antitrust act because there were no private Wisconsin plaintiffs seeking damages and because federal law, by itself, provided all of the relief that the government plaintiffs sought. *Cf. Firsdon v. United States*, 95 F. 3d 444, 448 (6th Cir. 1996) (declining to apply collateral estoppel to an issue that would not have affected the final remedy available in the first action). Indeed, the D.C. District Court emphasized that "[t]he plaintiff states concede that their laws do not condemn any act proved in this case that fails to warrant liability under the Sherman Act," *Microsoft Corp.*, 87 F. Supp. 2d at 55, and thus state law added nothing to the scope of liability.

That the scope of Wisconsin's antitrust act was collateral to the government action is evident by the fact that, out of hundreds of pages of briefing, the parties devoted only a few paragraphs to the reach of Wisconsin's antitrust act. *See Chicago Truck Drivers*, 125 F. 3d at 530 (holding that the briefing and analysis of a question of law was so "spars[e]" that it was "doubt[ful] that the issue was 'actually litigated' . . . , at least to the extent that it would be entitled to estoppel"). The federal court itself confirmed the collateral nature of the Wisconsin law claim, spending only one paragraph on the reach of the Wisconsin law. *Microsoft Corp.*, 87 F. Supp. 2d at 55. Thus, state law added nothing to the result either in the district court or on appeal, and the trial court was correct in not giving preclusive effect to the federal court's conclusion on an issue of Wisconsin law.

CONCLUSION

The longstanding holding of *Pulp Wood* -- that Wisconsin's antitrust statute is limited to intrastate transactions -- is the correct interpretation of legislative intent and thus of Wisconsin law. This Court confirmed as much last year in the *Conley Publishing* case. Because, as the trial court concluded, the alleged wrongful conduct occurred outside Wisconsin, Olstad has no cause of action against Microsoft under Section 133.03 and his suit was properly dismissed.

Dated this 12th day of May, 2004.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The enclosed brief contains 8,191 words.

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SUPREME COURT OF WISCONSIN

Appeal No. 03-1086

GENE OLSTAD, individually and
on behalf of all others similarly situated,

Plaintiff-Appellant,

vs.

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100, inclusive,

Defendants-Respondents.

Appeal from the Circuit Court for Milwaukee County
The Honorable Jeffrey A. Kremers, Presiding

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ARGUMENT

I. MICROSOFT SHOULD NOT BE ALLOWED TO RELITIGATE THE ISSUE OF ITS VIOLATION OF CHAPTER 133.

Microsoft concedes that it litigated the issue of its violation of Wisconsin's antitrust statute in the Federal Action[1], and lost on that issue. Microsoft argues that the ruling in that case should not be given preclusive effect because Microsoft did not have the incentive to argue this issue since Wisconsin's attorney general sought the same remedy as the Department of Justice. That is not a sufficient showing to avoid issue preclusion.

In deciding whether to apply issue preclusion, Wisconsin courts have developed a "fundamental fairness" standard. *Michelle T. v. Crozier*, 173 Wis.2d 681, 686, 688, 495 N.W.2d 327 (1993). The question of fairness comes down to whether the party contesting application of the doctrine has had a "full and fair opportunity to litigate in the first action." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4423, p. 602 (2002) (emphasis added). The redetermination of issues is usually warranted only where there is "reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation." *Montana v. U.S.*, 440 U.S. 147, 164, n. 11 (1979). Microsoft bears the burden of establishing the lack of a full and fair opportunity to litigate the claims in the Federal Action. 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4465, p.734-735 (2002). It must identify specific characteristics of the first trial that gave it less than a full and fair opportunity to litigate. *Id.* at 733.

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[1] *See United States v. Microsoft*, 84 F.Supp.2d 9 (D.D.C. 1999) and *United States v. Microsoft*, 87 F.Supp.2d 30 (D.D.C. 2000).

Microsoft has not met its burden. Microsoft had every incentive and the ability to fully litigate this claim in the Federal Action. Not only was the future of the company at stake, but it was common knowledge that there were a multitude of civil actions waiting in the wings. *See* Ken Auletta, World War 3.0 (2001). The parties put on 76 days of trial, including voluminous evidentiary submissions, extensive briefing and argument. All issues the parties considered germane were addressed. Microsoft also claims that the issue actually briefed was somewhat different than the issue it raised here. Issue preclusion also applies to issues that a party could have raised in a federal proceeding, but chose not to. *See* 18 Moore's Federal Practice (3d Ed.), §133.13, p. 133-16.

Microsoft completely litigated the Federal Action. If Microsoft had a basis to dismiss the claims under Wisconsin law in the Federal case, it was bound to raise them. It had the opportunity and should not be able to relitigate that issue here. The ruling in that case is binding here.

Microsoft also argues that the ruling in the Federal Action is not binding precedent here. The argument raised by Appellant has nothing to do with the precedential value of that ruling. The issue here is not whether the Federal Action is the final word on Wisconsin law. The question is whether Microsoft should be given an opportunity to relitigate the issue of its violation of Wisconsin's antitrust statute when it has fully litigated that issue in the Federal Action and lost.

II. WHATEVER JURISDICTIONAL LIMITATIONS WERE IMPOSED BY *PULP WOOD*, THOSE LIMITS DO NOT APPLY TO WISCONSIN'S AMENDED ANTITRUST STATUTE.

While the parties clearly disagree on the scope of the ruling in *Pulp Wood*, even if one accepts Microsoft's interpretation of *Pulp Wood v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), its jurisdictional limits do not apply to Wisconsin's amended antitrust statute.

In 1980, Wisconsin amended its antitrust statutes to extend the remedy against monopolists to indirect purchasers. The purpose of this amendment was to allow a remedy for Wisconsin consumers that was denied to them under the federal antitrust statutes by the Supreme Court's ruling in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). In so doing, the Legislature expanded the scope and application of Wisconsin's antitrust statute so that it is no longer simply an intrastate version of the Sherman Act. Wisconsin has gone in a different direction in affording protection to its indirect purchaser consumers, protection that is not afforded under the Sherman Act.

Microsoft cites several cases for the proposition that Wisconsin's antitrust statute is a "reenactment" of the Sherman Act with application to "intrastate as distinguished from interstate transactions." *See* Respondent's Brief pp. 8-9.[2]

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[2] Microsoft has overstated the holding of those cases. None of the cases considered or ruled upon the application of Wisconsin's antitrust statute to cases where product sold in this state involves some element of interstate commerce in the chain from the producer to the consumer. Rather, these appellate cases "cite *Pulp Wood* summarily for the proposition that Wisconsin antitrust law, though taken from the federal statutes, applies 'to intrastate as distinguished from interstate transactions' — with the goal of citing analogous federal decisions in construing the state statutes." *Emergency One, Inc. v. Waterous Co., Inc.* 23 F.Supp.2d 959, 965 (E.D. Wis. 1998).

Microsoft relies on this dichotomy to justify the Trial Court's ruling. That dichotomy was premised on the fact that the Wisconsin statutes and the federal statutes were essentially identical, the only difference being their jurisdictional application. But that is no longer the case with Wisconsin's amended statute.

Unlike its federal counterpart, Wisconsin's amended antitrust statute extends protection to indirect purchasers. The Trial Court's and Microsoft's reliance on the dichotomy referenced in *Pulp Wood* and its progeny is antiquated. The 1980 amendments changed the statutory landscape so that *Pulp Wood* would no longer apply regardless of how it is interpreted.

The Trial Court's order granting summary judgment is erroneous in that it fails to address the legislative intent of the amended statute.

III. WISCONSIN'S AMENDED ANTITRUST STATUTE EXTENDS TO INTERSTATE MONOPOLIES THAT INJURE WISCONSIN CONSUMERS.

In amending the antitrust statute and extending its protection to Wisconsin's indirect purchasers, the Legislature filled a gap in the protection afforded by the federal antitrust statutes. *See In re Microsoft Antitrust Litigation,* 2001 WL 1711517,

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Microsoft also refers to this Court's recent decision in *Conley Publishing Group v. Journal Communications, Inc.*, 2003 WI 119, as reaffirming this interstate/intrastate dichotomy. *Conley* did not consider the scope of application of Wisconsin's statute. The decision referenced the dearth of Wisconsin case law on predatory pricing as a reason that Wisconsin courts tend to follow federal court interpretations of the Sherman Act. In its discussion, the Supreme Court included in gratuitous dicta that the dearth of state case law was not surprising "because the scope of Chapter 133 is limited to the intrastate transactions." *Id.* at ¶1, citing *Reese v. Associated Hospital Service,* 45 Wis. 2d 526, 532, 173 N.W.2d 661 (1970), which is another case citing *Pulp Wood* as a basis for relying on federal precedent. The language in *Conley* is nothing more than a long standing recognition of the value of federal precedent in interpreting Wisconsin's antitrust statute.

p. 3 (Me. Superior March 26, 2001). In so doing, the Legislature necessarily extended the application of the statute to interstate monopolies which have injured Wisconsin consumers.

A. The Intent Of The Legislature.

Both sides agree that the role of this Court is to discern the intent of the Legislature. Microsoft ignores the intent of the 1980 amendments and focuses on the intent of the Legislature in passing the original antitrust statutes in 1893. That is not the proper focus. The Court must look to the Legislature's intent in amending the statute in 1980.

As Appellant pointed out in its Opening Brief, the intent of the Legislature is to be gleaned from the plain language of the statute itself. Neither the Trial Court nor Microsoft ever addresses the language of the statute. There is nothing in the language of Wis. Stats. §133.03(2) which remotely suggests that the Legislature intended to limit its application to wholly intrastate monopolies. Focusing on the language itself, the statute should not be construed as imposing such a limitation.

That intent is further reinforced by a number of other factors. First is the practical effect of such a limitation. In considering legislative intent, the Court must look to the practical ramifications of its ruling to determine if they are consistent with the legislative intent. An interpretation of the statute that would lead to an unreasonable or absurd result is to be avoided. *State v. Michels*, 141 Wis.2d 81, 88, 414 N.W.2d 311 (Ct.App. 1987).

The Legislature specifically stated that its intent in amending the statute was to afford protection to the public against the creation and perpetration of monopolies. Wis. Stats. §133.01. If the statute is restricted, as Microsoft suggests, the protection afforded indirect purchasers would be illusory. The Legislature's repeal of *Illinois Brick* would have been merely an academic exercise without meaning.

There are virtually no wholly intrastate companies doing business any longer, and even fewer that would have the power to affect a monopoly within the state. It is ludicrous to suggest that Wisconsin's Legislature intended to limit its repealer statute to such a small group.

It is also inconceivable that the Legislature thought it important enough to pass repealer legislation, but intended that the protection afforded its citizens would be limited to wholly intrastate commerce. Why would the Legislature pass a statute to protect indirect purchasers within this state, but limit that protection to an extremely small group of wholly intrastate monopolies, allowing those same citizens to be victimized by national monopolists such as Microsoft? The answer is that the Legislature would not and did not. To do so would make no sense..

B. There Is No Public Policy Of Protecting Monopolies Against Multiple Liability.

As a testament to its creative abilities, Microsoft suggests that, in fact, the Legislature intended to limit application of the repealer statute to wholly intrastate monopolies based on the "sound public policy" of protecting monopolists against multiple liability. This is absurd.

The Legislature did not intend to protect monopolists. To the contrary, the Legislature's stated purpose was "to safeguard the public against the creation or perpetuation of monopolies . . ." Wis. Stats. §133.01. To accomplish that end, the Legislature directed that the statute "be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." *Ibid.* Allowing national monopolies to operate within Wisconsin with immunity is contrary to that intent.

Microsoft's contention that repealer statutes are limited to intrastate monopolies so as to avoid multiple liability has been previously considered and rejected by the United States Supreme Court in *California v. Arc America Corp.*, 490 U.S. 93, 105 (1989), where the Court stated that there is no "federal policy against States imposing liability in addition to that imposed by federal law." The Court recognized that state repealer statutes, such as Wisconsin's, work in conjunction with federal antitrust laws and "are consistent with . . . deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *Id.* at 102.

Based on its pronouncements in *Illinois Brick* and *Arc America*, the United States Supreme Court has clearly stated that, while the federal statutes will not be applied to indirect purchasers, the states are empowered to legislate in favor of indirect purchasers as a deterrent to protect its citizens against monopolistic injury, even though such statutes may expose monopolists to multiple liability. That is precisely what Wisconsin's Legislature has done.

C. The Legislature Is Presumed To Have Passed The Amended Statutes Mindful That The Interstate/Intrastate Dichotomy Had Been Repudiated By The Courts.

To the extent *Pulp Wood* limited application of Wisconsin's original antitrust statute to wholly intrastate commerce, that limitation was premised on the constitutional parameters prevailing at the time. *Emergency One,* 23 F.Supp.2d at 965. However, those constitutional parameters had changed by 1980. The Legislature is presumed to have been aware of, and acted within, the existing constitutional limitations at the time. *See State v. Block,* 222 Wis.2d 586, 591, 587 N.W.2d 914 (Ct.App. 1998). Microsoft argues this principle in support of its interpretation of Wisconsin's 1893 antitrust statute. Microsoft ignores that the Legislature, in 1980, was also presumed to know that the absolute dichotomy between interstate and intrastate regulation had been abolished. *See* discussion in Appellant's Opening Brief at pp. 13-14. In light of that abolition, if the Legislature truly intended to limit application of the amended statute to wholly intrastate commerce, it could have done so. It did not.

D. Removal Of The "In This State" Limitation In The Amended Antitrust Statutes Evinces An Intent That They Apply To Interstate Monopolies.

Microsoft argues that if the Legislature intended to change the scope of the statute to apply to interstate monopolies, it was required to expressly so state. The context of the amendment to include indirect purchasers does precisely that. The Legislature's "intent to change the meaning [of the statute] necessarily and irresistibly follows the changed language." *See Guse v. A.O. Smith Corp.,* 260 Wis. 403, 406, 51

N.W.2d 24 (1952). The addition of protection for indirect purchasers was meant to override the limitations in the federal antitrust statutes. Wisconsin's statute clearly has to apply to interstate monopolies in order to be effective given the legal and business climate that existed in 1980.

But if there is any doubt, that doubt is resolved by the fact that the Legislature removed the "in this state" limitation in the statute. Prior versions of the antitrust statute consistently referred to monopolization of "any part of the trade or commerce **in this state**." (Emphasis added). However, the 1980 amendments removed the "in this state" limitation. *See* Wis. Stats. §133.03 (1980). This change, coupled with the Legislature's directive that the statutes "be interpreted in a manner which gives the most liberal construction to achieve the aim of competition" (Wis. Stats. §133.01), clearly show an intent to eliminate geographical limitations.

Microsoft also argues that because the Legislature did not expressly state that it was overruling *Pulp Wood,* that case still controls the application of the amended statute. Microsoft's argument presumes that the Legislature interpreted *Pulp Wood* as Microsoft does, imposing an absolute bar to the application of Wisconsin's antitrust statute to any interstate monopoly. There is nothing in the legislative history to suggest that the Legislature interpreted *Pulp Wood* as mandating such an exclusion. To the contrary, the only case referenced in the legislative history materials is the *Milwaukee Braves*[3] case, in which this Court recognized the application of Wisconsin's antitrust statute to interstate monopolies with a significant impact in this

[3] *State v. Milwaukee Braves*, 31 Wis.2d 699, 144 N.W.2d 1 (1966).

state. Based on the language in the *Milwaukee Braves* case, there was no need for the Legislature to "overrule" *Pulp Wood.*

IV. MICROSOFT'S ANALYSIS OF THE CASES IS INCONSISTENT.

Another major flaw in Microsoft's arguments is their inconsistency. On the one hand Microsoft argues that *Pulp Wood* limited the application of Wisconsin's antitrust statute to wholly intrastate conduct. But Microsoft tries to distinguish the *Allied Chemical*[4] and *Milwaukee Braves* cases on the basis that they involved acts within the state.[5] If the dichotomy of *Pulp Wood* is absolute as Microsoft argues, then Wisconsin's antitrust statute could not apply in those other cases regardless of what conduct occurred within the state, because both involved what was clearly interstate commerce. If *Pulp Wood* means what Microsoft says it means, then it necessarily follows that this Court wrongly decided *Allied Chemical,* and its statements in *Milwaukee Braves* regarding the scope of Wisconsin's law were simply wrong. Microsoft does not openly confront this Court's holdings in those other cases, but that is the practical effect of its argument.[6]

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[4] *State v. Allied Chemical & Dye Corp.*, 9 Wis.2d 290, 101 N.W.2d 133 (1960).

[5] Microsoft suggests that this distinction is germane because there are no allegations it engaged in conduct within the state. First of all, that is not true. Appellant has alleged conduct in Wisconsin, including Microsoft's marketing and sale of its products and distribution of licenses to consumers in Wisconsin. There are additional allegations in the *Capp v. Microsoft* case pending in Dane County, which Microsoft references in footnote 1 of its brief. The fact is, the full extent of Microsoft's conduct within this state remains an open issue. Microsoft is careful not to deny there was no conduct in Wisconsin, only that no such conduct was alleged by Plaintiff. At this stage of the litigation, Plaintiff does not know the extent of Microsoft's activities within Wisconsin. A class has not even been certified in this case, and little discovery has been done.

[6] In an effort to deflect its implicit assault on *Allied Chemical* and *Milwaukee Braves,* Microsoft suggests that Appellant has argued that these cases overrule *Pulp Wood.* That is not true. Appellant contends that Microsoft's interpretation of *Pulp Wood* is irreconcilable with these other cases.

Microsoft cannot have it both ways. Either *Pulp Wood* does not mean what Microsoft claims, or the decisions in *Allied Chemical* and *Milwaukee Braves* are wrong. *See In re Methionine Antitrust Litigation,* 2001 WL 679115, at p. 4 (N.D. Cal. 2001) ("the *Allied Chemical* and *Milwaukee Braves* Wisconsin Supreme Court decisions simply make no sense if Wisconsin's antitrust laws do not reach interstate commerce."). The answer is self-evident.

CONCLUSION

Based on the foregoing, the Court should overturn the Trial Court's decision and remand to that court for further proceedings.[7]

Dated: May 24, 2004

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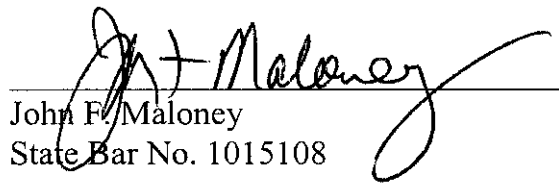
[7]The Trial Court found that Gene Olstad was not a proper class representative, and upon remand, the right exists for the putative class to substitute a plaintiff from that class to serve as a class representative. *See Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999).

CERTIFICATION AS TO FORM AND LENGTH

I, John F. Maloney, certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of the brief is 2942 words.

Dated at Milwaukee, Wisconsin, this 24 day of May, 2004.

McNALLY, MALONEY & PETERSON, S.C.

By: 

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SUPREME COURT OF WISCONSIN

Appeal No. 03-1086

GENE L. OLSTAD,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100 inclusive,

Defendants-Respondents.

ON APPEAL FROM A FINAL ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY KREMERS, PRESIDING
CIRCUIT COURT CASE NO. 00-CV-003042

BRIEF AND APPENDIX OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

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BRIEF OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

I. INTRODUCTION

Wisconsin's counties owe a duty to their taxpayers to obtain the best possible price for goods purchased on behalf of the public. Each year, counties spend millions of taxpayer dollars on goods that travel through interstate commerce from suppliers located outside of Wisconsin. With

respect to the issues presented in this case, there can be no doubt that the public interest is best served by providing adequate remedies to Wisconsin consumers—including counties and other governmental entities—that are adversely impacted by predatory and illegal business practices.

The Trial Court's conclusion that Wisconsin's antitrust laws apply only to intrastate transactions—if ratified by this Court—would severely limit the ability of Wisconsin local governments to seek remedies for illegal business practices that impose substantial costs on Wisconsin citizens. The WCA believes that the Trial Court's decision is inconsistent with Wisconsin law and, because it interferes with the counties' duty to their taxpayers, is bad public policy.

II. ARGUMENT

Section 133.03(1), *Wis. Stats.*, proscribes "*every* contract, combination... or conspiracy, in restraint of trade or commerce...." Similarly, § 133.03(2), *Wis. Stats.*, applies to "*every* person" who monopolizes "*any part* of trade or commerce...." The statute makes no distinction between interstate or intrastate transactions. Instead, for a violation to occur, the prohibited conduct must simply impact Wisconsin trade or commerce.

Relying almost entirely on the 1914 case of *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), Microsoft argues that Wisconsin's antitrust law "applies only to intrastate conduct." Microsoft Br. at 6. Even ignoring the fact (as demonstrated in Appellants' and other *amici*'s briefing) that *Pulp Wood* and its progeny fall far short of establishing such a rule regarding the breadth of the state's *prior* antitrust statute, it simply makes no sense to preclude Wisconsin's *current* antitrust statute—which went into effect in 1980 when chapter 133 was "repeal[ed] and recreat[ed]"—from reaching interstate transactions. Such a result would undermine the clear intent of the Wisconsin Legislature that the current law be "interpreted in a manner which gives the most liberal construction to achieve the aim of competition." § 133.01, *Wis. Stats.* Moreover, it would eviscerate indirect purchaser rights of action under the act, which often provide the *only* realistic means of privately enforcing the state's competition policy.

A. Wisconsin Local Governments, As Consumers Of Goods And Services On Behalf Of Their Citizens, Could Be Impacted Significantly By The Outcome Of This Appeal.

Counties, cities, villages, towns, school boards and other local governments in Wisconsin spend enormous sums of money on behalf of the

public. As the following table illustrates, capital and operational expenditures by Wisconsin local government in 2002 exceeded $16 billion.

Category of Government	Total Expenditures[1]
Counties	$3,927,632,200
Cities	$3,057,512,600
Villages	$ 615,441,100
Towns	$ 603,985,900
Schools	$8,347,500,000
Total	**$16,552,071,800**

Although the WCA is unaware of any study that indicates what percentage of those expenditures are made on products emanating from outside the State of Wisconsin, undoubtedly a considerable fraction of those purchases involve goods—ranging from computers and office supplies to large public works projects—that have traveled across state borders.

As vanguards of the public trust, local units of government are subject to close scrutiny when it comes to spending taxpayer money. In addition to statutory budget hearing and open meetings requirements, local governments must comply with strict statutory guidelines when awarding contracts for public works projects. Section 59.52(29)(a), *Wis. Stats.*, governs the bidding procedure applicable to counties, while §§ 60.47, 61.55 and 62.15, *Wis. Stats.*, establish bidding requirements for towns, villages

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[1] County, city, village and town data is taken from Wisconsin Legislative Fiscal Bureau, *Municipal and County Finance* (Informational Paper # 16, prepared by Rick Olin, Jan. 2003), App. at 4-7. School district data is taken from Wisconsin Legislative Fiscal Bureau, *Elementary and Secondary School Aids* (Informational Paper # 27, prepared by Russ Kava and Layla Merrifield, Jan. 2003), App. at 10.

and cities, respectively. If the value of a public works contract exceeds $25,000 for counties or $15,000 for cities, villages and towns, the contract *must* be let to the lowest responsible bidder. Local governments cannot decide, for instance, to favor bidders located in Wisconsin over bidders from other states, or goods that originated in Wisconsin over goods from elsewhere. *See Menzl v. City of Milwaukee*, 32 Wis. 2d 266, 274, 145 N.W.2d 198 (1966); OAG 9-85 (March 19, 1985); *City of Dayton, ex rel. Scandrick v. McGee*, 423 N.E.2d 1095 (Ohio 1981).

B. The Trial Court's Interpretation Of Chap. 133, *Wis. Stats.*, Would Severely Limit The Ability Of Local Governments To Seek Remedies For Patently Illegal Conduct.

Should this Court restrict the reach of the state's antitrust laws, Wisconsin local governments could very well become targets for illegal conduct through operation of the very statutes designed to ensure that the local governments do not overpay for goods. Depending on what an "intrastate" standard would mean in practicality, such a standard could cripple the state's current antitrust statute for two reasons. First, nearly every commercial transaction involves interstate commerce. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997). Thus, Wisconsin consumers could look only to federal law for a remedy. However, because Wisconsin's local governments are often

"indirect purchasers"—buying not from the manufacturer directly, but through an intermediary—they cannot sue under federal antitrust law, which limits standing to "direct" purchasers. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Consequently, Wisconsin local governments would often be left without any recourse.

By way of example, suppose that a county solicited bids for the construction of a new jail facility. Assume that (1) all of the major brick manufacturers are headquartered outside of Wisconsin; (2) these manufacturers engaged in conduct proscribed by Chap. 133, *Wis. Stats.*, such as price fixing, which raised the price of bricks; and (3) none of the manufacturers was also a contractor bidding on the project, so that the county would "indirectly" purchase the price-fixed brick. In this scenario, every contractor submitting a bid to construct the county jail facility would need to obtain a bid price for the brick and would include that artificially inflated price for brick in its cost for completing the project. As a result, the county would pay a higher price for the project than it would have paid in the absence of the illegal conspiracy.

Presumably under the standard advocated by Microsoft, Wisconsin's antitrust law would not apply to the brick manufacturers' patently illegal activity under at least some of the above scenarios, even though (1)

Wisconsin's antitrust statute explicitly protects local governments, § 133.02, *Wis. Stats.*; (2) the county has otherwise satisfied all elements of an antitrust claim, and (3) the illegal conduct impacts the county. At the same time, the federal Sherman Act would provide no recourse to the aggrieved county because of *Illinois Brick*'s indirect purchaser bar. Thus, any response to the illegal conduct depends on direct purchasers suing the brick manufacturers, even though those contractors (1) may have long-standing relationships with their suppliers and (2) likely were able to "pass-through" any illegal overcharge to their customers, thus leaving them with little incentive to bring such an action under federal law.

That cannot be the result the Wisconsin Legislature envisioned. The repeal and recreation of the Wisconsin Antitrust Act was effected, in part, in reaction to the United States Supreme Court's decision in *Illinois Brick*, to confirm the existence of indirect purchasers remedies under Wisconsin's antitrust laws. To limit the reach of Wisconsin's antitrust laws to "intrastate transactions," however, would leave consumers in this state little better off than they would have been absent the indirect purchaser provision. Indeed, the problem is compounded in the case of local governments due to their limited discretion in making purchasing decisions,

since the local government cannot choose to contract with one entity over another for purposes of preserving an "intrastate" claim.

Under the plain language of Wisconsin's current statute, what matters most is whether an illegal act affects trade and commerce in Wisconsin and causes harm to consumers in this state. It is a well-settled rule that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945); *see also Poole v. State*, 60 Wis. 2d 152, 156, 208 N.W.2d 328, (1973) ("a person may be prosecuted for doing an act outside this state which has a criminally proscribed consequence within the state"). Recognizing this proposition, the district court in *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F.Supp.2d 959 (E.D. Wis. 1998), properly concluded that "Wisconsin antitrust law [applies] to unlawful activity which has significantly and adversely affected trade and economic competition within this state." *Id.* at 969. This is no different than the standard in other states that do not confine their antitrust laws to intrastate conduct. *See, e.g., R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Reptr. 515, 593 (Cal. Ct. App. 1974).

Any deviation from an effects standard will ultimately result in Wisconsin courts engaging in the futile effort of creating a coherent method of determining whether conduct that may affect Wisconsin consumers is "intrastate" in nature. Particularly in the context of indirect purchaser cases, any "intrastate" standard will find no basis in Chapter 133, *Wis. Stats.* For example, in the hypothetical described above, would the county's purchase of brick through a Wisconsin contractor (who obtained the brick from an out-of-state manufacturer) constitute an "intrastate transaction," since both the immediate seller and the buyer are located in Wisconsin? If not, would the outcome change if one of the brick manufacturers happened to be located in Wisconsin? Would the answer to that question depend on whether the county purchased brick that had been made by the Wisconsin manufacturer? And would that answer, in turn, depend on whether the brick was purchased from a Wisconsin reseller verses an intermediary from another state? Microsoft's effort to harmonize *Pulp Wood* and *State v. Allied Chemical*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960), suggests that the statute *might* apply under at least some of these scenarios. *See* Microsoft Br. at 27-28. However, none of these questions can be answered by the statute unless an "effects" standard is adopted, as the Legislature clearly envisioned.

C. Microsoft Could Escape Any Liability For Harm To Wisconsin's Consumers Under A Restrictive "Intrastate" Standard.

A federal district court and the United States Court of Appeals for the D.C. Circuit have already concluded that Microsoft violated Wisconsin's antitrust laws based on conduct also at issue in this case. *See United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 54 (D.D.C 2000), *aff'd in part, rev'd in part, rem'd in part*, 253 F.3d 34, 46 (D.C. Cir. 2001). The WCA estimates that, as a result of the exclusionary conduct at issue here, Microsoft has overcharged Wisconsin governmental entities on the order of $65 million from May 1994 to the end of 2003. That is money that could have been used for other useful purposes on behalf of the public, or even returned to taxpayers. Nevertheless, Microsoft is urging this Court to adopt a standard that would well result in *no one* recovering *any* illegal overcharges Microsoft may have obtained by means of exclusionary conduct that has affected trade and commerce in Wisconsin.

In a recent decision involving Microsoft that confirmed indirect purchaser standing under the Iowa Competition Law, the Iowa Supreme Court observed that violations of the state's antitrust laws may go entirely unpunished without the ability of indirect purchasers to enforce the statute. *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002). The Iowa Court

noted that, while *Illinois Brick* pre-supposed that "those who were directly injured have the greatest incentive to bring suit to enforce antitrust laws," the reality here was different:

> Clearly, direct purchasers such as Dell, Compaq, Gateway, and IBM have not sued Microsoft for antitrust infringements. Even the majority in *Illinois Brick* recognized that direct purchasers likely will not enforce antitrust laws out of fear of retaliation by their suppliers, such as Microsoft—the sole supplier of a popular operating system. Instead, the direct purchasers pass the overcharge onto indirect purchasers who are ultimately damaged by Microsoft's monopolistic conduct. The fact that no direct purchaser has yet sued Microsoft for antitrust violations suggests that no direct purchaser will do so.

Id. at 450.[2]

In short, direct purchasers are unlikely to enforce Wisconsin's competition policy because they fear retaliation from Microsoft—with considerable justification, *see, e.g., United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 38-43 (D.D.C. 1999) (detailing Microsoft's retaliation against IBM). Moreover, direct purchasers have little incentive to pursue an action against Microsoft because *they* have not been injured by Microsoft's

[2] Curiously, Microsoft claims that "direct purchasers are suing Microsoft for the very same alleged overcharge as Appellant in this case," Microsoft Br. at 20, implying that Microsoft might face multiple liability were this Court to rule that Wisconsin's antitrust law applies to interstate transactions or conduct. However, in addition to the Iowa Supreme Court's observation that no direct purchasers have sued Microsoft, a federal district court noted that "[n]o OEM or other member of the putative class presently in business has instituted an antitrust overcharge suit against Microsoft." *In re Microsoft Corp. Antitrust Litig.*, 218 F.R.D. 449, 451 (D.Md. 2003). Thus, the possibility that Microsoft might face multiple liability for conduct that has affected trade or commerce in Wisconsin appears remote, at best.

overcharges. Instead, "[t]he true incentive to enforce [the state's] antitrust law lies with the real victims... who may lack a direct business relationship with the antitrust violator." *Comes*, 646 N.W.2d at 450. Because Microsoft's overcharges are simply passed on to Wisconsin consumers—the "real victims"—indirect purchasers are the logical agents for enforcing Wisconsin's antitrust laws.

While the precise legal issue facing this Court differs from the issue before the Iowa Supreme Court in *Comes*, the policy ramifications are the same. Namely, whether *someone* will have the incentive and practical ability to enforce competition laws—whether state or federal—when violations of those laws affect trade or commerce in Wisconsin. Because of the inability of Wisconsin's indirect purchasers to bring a cause of action against Microsoft under federal law, holding Microsoft accountable for conduct that affected Wisconsin's consumers will depend on the reach of the state's antitrust laws.

Even if there were a remote possibility that direct purchasers would sue Microsoft for its anticompetitive conduct, Microsoft's suggestion that, in 1979, the Wisconsin Legislature restricted the scope of indirect purchaser actions to intrastate transactions due to concern about subjecting defendants to "multiple liability," Microsoft Br. at 19, is an incredible bit of

revisionist history. In *California v. ARC America Corp.*, 490 U.S. 93 (1989), the United States Supreme Court affirmed the ability of states to allow indirect purchaser actions under state antitrust laws, even if such actions would subject defendants to "multiple liability." As the Court noted, "nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *Id.* at 103. Indeed, the Court concluded:

> *Illinois Brick*, as well as *Associated General Contractors* and *Blue Shield*, all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability *in addition to* that imposed by federal law. Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.

Id. at 105 (emphasis added). In any event, the specter of multiple liability is illusory. As the Iowa Supreme Court observed:

> There are few, if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single antitrust violation. Furthermore, the district courts are fully capable of ensuring antitrust defendants are not forced to pay more in damages than the amount to which the injured parties are entitled.

Comes, 646 N.W.2d at 449-450.

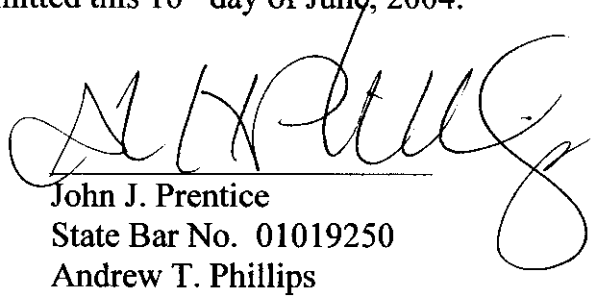
In short, interpreting Wisconsin's antitrust laws in such a way as to permit effective private enforcement by means of indirect purchaser actions does not, as Microsoft contends, risk imposing "multiple liability" on

antitrust defendants; rather, it often provides the only realistic means for someone to obtain *any* recovery for illegal conduct affecting Wisconsin consumers.

III. CONCLUSION

Based upon the above, and the arguments set forth in Appellant's briefs, the WCA respectfully requests that the Court reverse the trial court's decision that Wisconsin's antitrust laws apply only to intrastate activities.

Respectfully submitted this 16th day of June, 2004.



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CERTIFICATION

I certify that this Brief conforms to the rules contained in *Rules* 809.19 (8)(b) and (c) and that it is:

> Desktop publishing or other means (proportional serif font min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 point and max. of 60 characters per line.) The text is 13 point type and the length of the Brief is 2924 words.

Dated this 16th day of June, 2004.

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SUPREME COURT OF WISCONSIN

Appeal No. 03-1086

GENE L. OLSTAD,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100 inclusive,

Defendants-Respondents.

ON APPEAL FROM A FINAL ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY KREMERS, PRESIDING
CIRCUIT COURT CASE NO. 00-CV-003042

APPENDIX OF *AMICUS CURIAE*
WISCONSIN COUNTIES ASSOCIATION

APPENDIX

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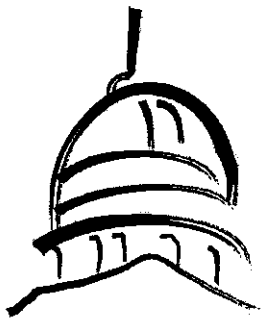
Legislative Fiscal Bureau, Informational Paper # 27, *Elementary and Secondary School Aids* (January, 2003) (selected portion)	8-10

Municipal and County Finance

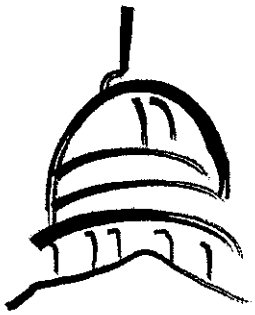


Informational Paper 16

Wisconsin Legislative Fiscal Bureau

January, 2003

Municipal and County Finance



Prepared by
Rick Olin

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INTRODUCTION

This bulletin contains unaudited data supplied to us on the state prescribed financial report schedules by the officials of Wisconsin counties, cities, villages, and towns for calendar year 2002.

The Bureau of Local Government Services (BLGS) is responsible for collecting and verifying the reported information from local units of government. We appreciate the assistance and cooperation extended to us by the municipal and county officials.

The basic data used in this bulletin are on file in our office. The data elements are also on magnetic tape. Note: This bulletin was prepared electronically, therefore, some rounding occurs and some totals may differ insignificantly.

This bulletin should enable users to make general comparison among and between local units of government. Users should exercise caution when interpreting reported data, particularly variances in reported expenditures. Variations in local government unit expenditures may be attributed to such factors as level of efficiency and economy, differences in accounting practices, organizational structures, service levels, population, population densities, topographical features, subsoils, neighboring municipalities and labor costs.

The data presented on the lines for each county and municipality are the amounts contained in the governmental fund types. This data is not comparable to that for 1985 and prior years. The major differences are (1) the data contains the activities of the capital project and special assessment funds, and (2) the data does not include county enterprises. The data presented for each activity line includes operating expenditures and capital outlay and are expressed in thousands of dollars ($5,200 appears as $5.2).

The general property taxes collected for proprietary fund types and the activities of the county highway department internal service fund are reflected as part of the governmental fund type data in this bulletin. The enterprise funds and internal service fund data are included as separate entries to alert you that the officials of some municipalities and counties treat these activities as proprietary fund types. Officials of other municipalities and counties treat these activities as part of their governmental fund types. This may help you to understand some of the differences in revenues and expenditures when you compare the data of local units.

The data contained in this bulletin are unaudited. This bulletin has been prepared and released according to Wisconsin Statute (sec.73.10(2),Stats.). Any questions may be directed to Kenneth Schuck, of the General Purpose Governments Section at (608) 266-0204 or email to kschuck@dor.state.wi.us.

Frank A. Humphrey, Director
Bureau of Local Government Services
Division of State and Local Finance

	STATE TOTAL OF COUNTY GOVERNMENTS
2002 POPULATION	5,453,896
REVENUES - GOVERNMENTAL FUND	
TAXES	
GENERAL PROPERTY TAXES	1418559.4
TAX INCREMENTS	0
IN LIEU OF TAXES	0
OTHER TAXES	281451.8
TOTAL TAXES	1700011.2
SPECIAL ASSESSMENTS	0
INTERGOVERNMENTAL REVENUES	
FEDERAL AIDS	109434.3
STATE SHARED REVENUES	171544.8
STATE HIGHWAY AIDS	105378.1
ALL OTHER STATE AIDS	1222095.6
OTHER LOCAL GOVERNMENT AIDS	6758.4
TOTAL INTERGOVERNMENTAL REV.	1615211.3
LICENSES & PERMITS	16687.1
FINES, FORFEITS & PENALTIES	29745.4
PUBLIC CHG. FOR SERVICES	464443
INTERG. CHG. FOR SERVICES	112744.2
MISCELLANEOUS REVENUES	
INTEREST INCOME	64903
OTHER REVENUES	81452.3
TOTAL MISCELLANEOUS REVENUES	146355.3
SUBTOTAL - GENERAL REVENUES	4085197.8
OTHER FINANCING SOURCES	680933.2
TOT. REVENUE & OTHER FINANCING SOURCES	4766131
EXPENDITURES-GOVERNMENTAL FUND	
GENERAL OPERATIONS & CAPITAL	
GENERAL GOVERNMENT	552743.4
LAW ENFORCEMENT	347111.3
FIRE	3473.3
AMBULANCE	10772.3
OTHER PUBLIC SAFETY	433572.1
HIGHWAY MAINTENANCE & ADM.	191488.6
HIGHWAY CONSTRUCTION	135815.5
ROAD-RELATED FACILITIES	9649.3
OTHER TRANSPORTATION	64271.1
SOLID WASTE COLL & DISPOSAL	15683.6
OTHER SANITATION	2724.7
HEALTH & HUMAN SERVICES	1726468.7
CULTURE & EDUCATION	149486.9
PARKS & RECREATION	160113.6
CONSERVATION & DEVELOPMENT	124257.4
ALL OTHER EXPENDITURES	0
SUBTOTAL-OPER. & CAP. EXPEND	3927632.2
DEBT SERVICE	
PRINCIPAL	246762.4
INTEREST & FISCAL CHARGES	54830.2
TOTAL DEBT SERVICE	301592.7
SUBTOTAL - EXPENDITURES	4229224.9
OTHER FINANCING USES	420905.2
TOT. EXPENDITURES & OTHER FINANCING USES	4650130.2
TOTAL GENERAL OBLIGATION DEBT	1746062
PROPRIETARY FUND TYPES	
REVENUES	1664721.8
EXPENSES	1835810

004

	CITY OF PITTSVILLE	CITY OF WISCONSIN RAPIDS	CITY TOTAL WOOD COUNTY	STATE TOTAL OF CITIES
2002 POPULATION	872	18,421	40,802	3,045,360
REVENUES - GOVERNMENTAL FUND				
TAXES				
GENERAL PROPERTY TAXES	228.2	8296.6	17988.2	1171798.2
TAX INCREMENTS	90	2037.1	2360.8	141476.4
IN LIEU OF TAXES	2	856.5	2146.7	64799.3
OTHER TAXES	1	297.9	622	49377.4
TOTAL TAXES	321.3	11488.2	23117.8	1427451.5
SPECIAL ASSESSMENTS	0	288.1	903.9	52281.9
INTERGOVERNMENTAL REVENUES				
FEDERAL AIDS	0	54.1	65.5	103426.6
STATE SHARED REVENUES	351.8	4849.9	11744.6	672390
STATE HIGHWAY AIDS	81.3	1738.8	3378.1	149697.6
ALL OTHER STATE AIDS	104.5	1236.9	2223.1	126010.9
OTHER LOCAL GOVERNMENT AIDS	35.9	344.4	617.2	41730.3
TOTAL INTERGOVERNMENTAL REV.	573.7	8224.3	18028.6	1093255.6
LICENSES & PERMITS	5.1	196.2	523.3	69405.9
FINES, FORFEITS & PENALTIES	5.5	207.4	378.7	40352.5
PUBLIC CHG. FOR SERVICES	35.6	2834	3561.6	215485.8
INTERG. CHG. FOR SERVICES	0	272	507.2	93224
MISCELLANEOUS REVENUES				
INTEREST INCOME	12.7	280.8	973.6	93353
OTHER REVENUES	39.4	812.3	1363.5	111619.7
TOTAL MISCELLANEOUS REVENUES	52.1	1093.2	2337.2	204972.7
SUBTOTAL - GENERAL REVENUES	993.5	24603.7	49358.6	3196430.3
OTHER FINANCING SOURCES	92	3211.1	8606.7	965287.5
TOT. REVENUE & OTHER FINANCING SOURCES	1085.6	27814.8	57965.3	4161717.8
EXPENDITURES-GOVERNMENTAL FUND				
GENERAL OPERATIONS & CAPITAL				
GENERAL GOVERNMENT	150.2	3084.8	5738.9	374059.8
LAW ENFORCEMENT	118.8	3505.9	7539.2	665400.9
FIRE	69.3	2822.2	5918.1	355386
AMBULANCE	6.9	1009.3	1344.7	48764.5
OTHER PUBLIC SAFETY	0	552.6	1204.8	73174.3
HIGHWAY MAINTENANCE & ADM.	110.4	1813.2	5288.6	280993.9
HIGHWAY CONSTRUCTION	36.4	1246.1	3431.6	207177.3
ROAD-RELATED FACILITIES	8.2	986.2	2012.7	139485.7
OTHER TRANSPORTATION	0	645	1041	31990.6
SOLID WASTE COLL & DISPOSAL	71.2	1044.1	1950.1	141225.6
OTHER SANITATION	100.7	1990.4	2122.7	64372.7
HEALTH & HUMAN SERVICES	3.3	262.6	426	78092.3
CULTURE & EDUCATION	48.6	1402.4	2930.7	163322.9
PARKS & RECREATION	19.7	1037.7	3684.9	187906.7
CONSERVATION & DEVELOPMENT	135.5	973.3	4569	244019.1
ALL OTHER EXPENDITURES	0	111.7	111.7	2139.5
SUBTOTAL-OPER. & CAP. EXPEND	879.7	22488.3	49315.5	3057512.6
DEBT SERVICE				
PRINCIPAL	77.4	1887.4	4205.9	397219.2
INTEREST & FISCAL CHARGES	30.9	659.1	1800.6	177208.3
TOTAL DEBT SERVICE	108.4	2546.6	6006.6	574427.6
SUBTOTAL - EXPENDITURES	988.1	25034.9	55322.2	3631940.2
OTHER FINANCING USES	29	0	29	430635.2
TOT. EXPENDITURES & OTHER FINANCING USES	1017.1	25034.9	55351.2	4062575.4
TOTAL GENERAL OBLIGATION DEBT	340.8	9517.5	33581	3115295.2
PROPRIETARY FUND TYPES				
REVENUES	270.3	20555.7	46619.6	1623892.5
EXPENSES	304.2	19696.4	45095.1	1509882.7

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	VILLAGE OF PORT EDWARDS	VILLAGE OF RUDOLPH	VILLAGE OF VESPER	VILLAGE TOTAL WOOD COUNTY	STATE TOTAL OF VILLAGES
2002 POPULATION	1,938	422	541	5,865	703,180
REVENUES - GOVERNMENTAL FUND					
TAXES					
GENERAL PROPERTY TAXES	961.4	24	73.4	1963.4	251745.6
TAX INCREMENTS	0	0	0	0	43998.1
IN LIEU OF TAXES	47.8	0	2	53.3	13348.4
OTHER TAXES	0.4	0	1.6	8.4	11829.5
TOTAL TAXES	1009.7	24	77	2025.2	320921.7
SPECIAL ASSESSMENTS	7.5	0	0	49.2	14241.3
INTERGOVERNMENTAL REVENUES					
FEDERAL AIDS	0	0	0	0.7	6261.2
STATE SHARED REVENUES	255.8	75.4	146.7	968.9	83702.6
STATE HIGHWAY AIDS	95.7	11.5	14.7	240	34646.6
ALL OTHER STATE AIDS	33.7	2.6	54.3	125	20092.2
OTHER LOCAL GOVERNMENT AIDS	0	0	0	8	6357
TOTAL INTERGOVERNMENTAL REV.	385.2	89.6	215.7	1342.7	151059.8
LICENSES & PERMITS	5.4	1.6	1.2	27.7	17157.9
FINES, FORFEITS & PENALTIES	9.9	0	3.2	13.4	9117.7
PUBLIC CHG. FOR SERVICES	21	15.4	2.5	218	38120.4
INTERG. CHG. FOR SERVICES	26.4	0	0.3	109.5	12000.9
MISCELLANEOUS REVENUES					
INTEREST INCOME	24.7	4.7	1.6	50.7	12633.4
OTHER REVENUES	34.3	22.8	56.3	151.4	26572.6
TOTAL MISCELLANEOUS REVENUES	59	27.6	57.9	202.2	39206
SUBTOTAL - GENERAL REVENUES	1524.4	158.4	358.2	3988.1	601826.1
OTHER FINANCING SOURCES	52	0	0	52.2	235459.5
TOT. REVENUE & OTHER FINANCING SOURCES	1576.4	158.4	358.2	4040.3	837285.6
EXPENDITURES-GOVERNMENTAL FUND					
GENERAL OPERATIONS & CAPITAL					
GENERAL GOVERNMENT	205.7	19.6	102.4	637.7	79943.6
LAW ENFORCEMENT	268.1	0.2	12.6	282.7	105982.6
FIRE	164.5	15.2	33.2	461.9	70289.2
AMBULANCE	14.7	4.8	8.5	59.6	10013.9
OTHER PUBLIC SAFETY	0	0.1	0	13.1	9389.6
HIGHWAY MAINTENANCE & ADM.	439.5	10.9	36.8	803.8	62853.6
HIGHWAY CONSTRUCTION	0	5.7	0	273.9	54892.2
ROAD-RELATED FACILITIES	46.7	7.7	9.7	116.6	27102.6
OTHER TRANSPORTATION	6.8	0	0	6.8	1589.9
SOLID WASTE COLL & DISPOSAL	137.7	15.2	3.5	276.6	27803.5
OTHER SANITATION	151.3	0.2	0	299.3	38492.7
HEALTH & HUMAN SERVICES	21.1	0	0	24.6	3702.7
CULTURE & EDUCATION	0	6.4	21.1	31.1	43754.9
PARKS & RECREATION	121.9	8.4	20.5	192.4	30547.2
CONSERVATION & DEVELOPMENT	0.1	0	0	11	39357.2
ALL OTHER EXPENDITURES	0	0	2	2	9725.1
SUBTOTAL-OPER. & CAP. EXPEND	1578.7	94.9	250.6	3493.7	615441.1
DEBT SERVICE					
PRINCIPAL	66	0	0	247.6	136026.4
INTEREST & FISCAL CHARGES	23.3	0	0	111	44536.2
TOTAL DEBT SERVICE	89.4	0	0	358.6	180562.6
SUBTOTAL - EXPENDITURES	1668.1	94.9	250.6	3852.4	796003.7
OTHER FINANCING USES	0	2	0	31	36557.7
TOT. EXPENDITURES & OTHER FINANCING USES	1668.1	96.9	250.6	3883.4	832561.5
TOTAL GENERAL OBLIGATION DEBT	599.2	0	0	3081.6	822230.4
PROPRIETARY FUND TYPES					
REVENUES	289.3	43.1	152.7	1251.3	246913.2
EXPENSES	254.7	43.4	144.5	1108.6	226533.4

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	STATE TOTAL OF TOWNS
2002 POPULATION	1,705,356
REVENUES - GOVERNMENTAL FUND	
TAXES	
GENERAL PROPERTY TAXES	287239.3
TAX INCREMENTS	0
IN LIEU OF TAXES	796
OTHER TAXES	9489.3
TOTAL TAXES	297524.6
SPECIAL ASSESSMENTS	8037.4
INTERGOVERNMENTAL REVENUES	
FEDERAL AIDS	1928.8
STATE SHARED REVENUES	81673.2
STATE HIGHWAY AIDS	122330.8
ALL OTHER STATE AIDS	16041.7
OTHER LOCAL GOVERNMENT AIDS	9375.1
TOTAL INTERGOVERNMENTAL REV.	231349.7
LICENSES & PERMITS	18957.2
FINES, FORFEITS & PENALTIES	3121.2
PUBLIC CHG. FOR SERVICES	41110.5
INTERG. CHG. FOR SERVICES	5197.2
MISCELLANEOUS REVENUES	
INTEREST INCOME	12146
OTHER REVENUES	23471.3
TOTAL MISCELLANEOUS REVENUES	35617.3
SUBTOTAL - GENERAL REVENUES	640915.3
OTHER FINANCING SOURCES	93999.3
TOT. REVENUE & OTHER FINANCING SOURCES	734914.6
EXPENDITURES-GOVERNMENTAL FUND	
GENERAL OPERATIONS & CAPITAL	
GENERAL GOVERNMENT	105083.7
LAW ENFORCEMENT	31172.9
FIRE	68802
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HIGHWAY MAINTENANCE & ADM.	201938.2
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OTHER SANITATION	2659.2
HEALTH & HUMAN SERVICES	3058
CULTURE & EDUCATION	5067.1
PARKS & RECREATION	12265
CONSERVATION & DEVELOPMENT	10845.5
ALL OTHER EXPENDITURES	2182.9
SUBTOTAL-OPER. & CAP. EXPEND	603985.9
DEBT SERVICE	
PRINCIPAL	84333
INTEREST & FISCAL CHARGES	15569
TOTAL DEBT SERVICE	99902
SUBTOTAL - EXPENDITURES	703887.9
OTHER FINANCING USES	4362.9
TOT. EXPENDITURES & OTHER FINANCING USES	708250.8
TOTAL GENERAL OBLIGATION DEBT	338373.7
PROPRIETARY FUND TYPES	
REVENUES	30169.4
EXPENSES	26775.3

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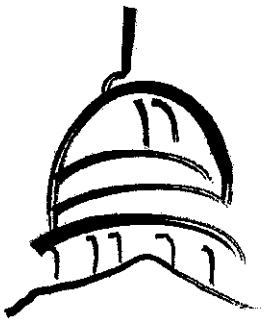
Elementary and Secondary School Aids



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Elementary and Secondary School Aids

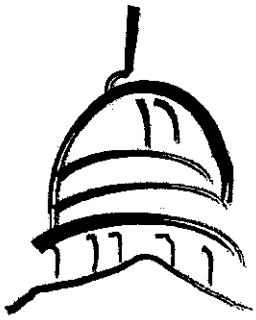

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Table 3: State School Aid, Gross School Levy, Total School Costs, Enrollments and Inflation (1987-88 through 2001-02)

Fiscal Year	State School Aid		Gross School Levy		Total School Costs		Public School Enrollment(b)		Costs Per Pupil		
	Amount(a)	Percent Change	Amount(a)	Percent Change	Amount(a)	Percent Change	Pupils	Percent Change	Amount	Percent Change	Consumer Price Index(c)
1987-88	$1,481.6	9.1%	$1,840.4	7.7%	$3,590.9	7.4%	772,363	0.6%	$4,649	6.7%	3.6%
1988-89	1,572.4	6.1	1,989.9	8.1	3,848.4	7.2	774,859	0.3	4,967	6.8	4.1
1989-90	1,693.2	7.7	2,158.5	8.5	4,142.1	7.6	782,905	1.0	5,291	6.5	4.8
1990-91	1,857.4	9.7	2,356.4	9.2	4,555.7	10.0	797,621	1.9	5,712	8.0	5.4
1991-92	1,950.4	5.0	2,568.0	9.0	4,877.1	7.1	814,671	2.1	5,987	4.8	4.2
1992-93	2,046.0	4.9	2,843.8	10.7	5,287.9	8.4	829,415	1.8	6,375	6.5	3.0
1993-94	2,186.6	6.9	2,988.1	5.1	5,527.1	4.5	844,001	1.8	6,549	2.7	3.0
1994-95	2,462.0	12.6	2,995.7	0.3	5,848.2	5.8	860,581	2.0	6,796	3.8	2.6
1995-96	2,705.2	9.9	3,023.6	0.9	6,150.2	5.2	870,175	1.1	7,068	4.0	2.8
1996-97	3,566.1	31.8	2,528.1	-16.4	6,546.8	6.4	879,149	1.0	7,447	5.4	3.0
1997-98	3,804.7	6.7	2,590.4	2.5	6,939.0	6.0	881,248	0.2	7,874	5.7	2.3
1998-99	3,989.4	4.9	2,735.8	5.6	7,250.7	4.5	879,537	-0.2	8,244	4.7	1.6
1999-00	4,226.3	5.9	2,795.2	2.2	7,535.3	3.9	877,713	-0.2	8,585	4.1	2.2
2000-01	4,463.3	5.6	2,927.8	4.7	7,899.5	4.8	879,476	0.2	8,982	4.6	3.4
2001-02	4,602.4	3.1	3,071.8	4.9	8,347.5(d)	5.7	879,361	0.0	9,493	5.7	2.8

(a) In millions of dollars; 1996-97 through 2001-02 state school aids are appropriated amounts.
(b) Headcount of the number of pupils enrolled on the third Friday in September.
(c) Percent change in the average CPI for calendar years 1987 through 2001.
(d) Preliminary.

STATE OF WISCONSIN
SUPREME COURT

Case No. 03-1086

GENE L. OLSTAD,
Individually and on Behalf of
All Others Similarly Situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
A foreign corporation, and
DOES 1 through 100, inclusive,

Defendant-Respondent.

ON APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY KREMERS, PRESIDING
CIRCUIT COURT CASE NO. 00-CV-0003042

NON-PARTY BRIEF OF THE AMERICAN ANTITRUST INSTITUTE

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ARGUMENT

I. INTRODUCTION

The Wisconsin antitrust statute, as modified in 1980, plainly prohibits, within present state and federal constitutional limits, anticompetitive conduct harming Wisconsin consumers, whether or not such conduct implicates interstate commerce. As demonstrated in the briefs for plaintiff Olstad, the State of Wisconsin, and the other *amici*, the absence of a statutory limitation on the reach of Wisconsin antitrust law is apparent from the statutory language itself, both on its face and when read according to the governing norms for determining statutory meaning; and this plain meaning is confirmed by the legislative history of the 1980 modifications to the statute.

Moreover, in its opinions in *State v. Allied Chemical & Dye Corporation*, 9 Wis.2d 298, 101 N.W.2d 133 (1960) and *State v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1 (1966), this Court recognized that even before the 1980 modifications, Wisconsin antitrust law applied to harmful anticompetitive activity involving interstate commerce. General statements in more recent opinions noting that state antitrust law is concerned with activity affecting intrastate economic life while federal antitrust law specifically seeks to interdict anticompetitive harm to interstate commerce do not in fact compel the kind of sharp bifurcation between state and federal regulatory authority that the experience

of the last one hundred years has shown to be both practically and analytically untenable.

Supreme Court statements noting the intrastate focus of state antitrust law trace back to this Court's early twentieth-century opinions in *Pulp Wood Company v. Green Bay Paper and Fiber Company.* In light of the 1980 legislative changes and *Allied Chemical* and *Milwaukee Braves,* those early opinions are of only limited, if any, continuing relevance in determining the applicability of current state antitrust law. To the extent that the *Pulp Wood* opinions do have any continuing relevance, however, a close examination of those opinions demonstrates that they do not in fact bar the application of state antitrust law to injurious activities implicating interstate commerce.

II. THE *PULP WOOD* OPINIONS

The *Pulp Wood* case involved an action to enforce contracts that were an integral part of a monopsony cartel conspiracy among Wisconsin pulp wood buyers. In *Pulp Wood Company v. Green Bay Paper & Fiber Company*, 157 Wis. 604, 147 N.W. 1058 (1914) *("Pulp Wood I")*, the Supreme Court reviewed the pleadings in the case and decided that a trial on the merits was necessary to determine whether the conduct alleged by the defendant had restricted competition unreasonably. In highlighting the possible anti-competitive effects to be explored at trial, the Supreme Court stressed the potential harm to pulp wood sellers from the

appointment of the plaintiff as a joint buying agent for a number of competing paper manufacturers. The court stated:

> The circuit court thought the contract was unlawful because it took a dozen consumers of wood out of the market and thus materially affected those who had pulp wood for sale, by reducing the number of buyers. The idea of the court was that the contracts had a tendency to reduce the price of wood. . . . [I]f true, it would also have a tendency to reduce the price at which the manufactured article might be sold to the consuming public. However, we think the pulp-wood producer is entitled to protection against combinations which unreasonably depress the price of his commodity, even though the general public might to some extent benefit by the depression.

Pulp Wood I, 157 Wis. at 623-24.

After remand and trial, the case returned to the Supreme Court. The Court found the contract sued upon to be unenforceable because it was an integral part of a conspiracy that established a monopoly in the purchasing of wood in *northern Michigan.* The Court did not find that either paper producers or ultimate consumers in Wisconsin suffered any harm as a result of the monopsony cartel and recognized that both groups indeed might have benefitted. The Court emphasized that both the victims of the buyers' cartel and the anticompetitive harms it caused were to be found primarily in northern Michigan, although the conspiracy had secondary impacts on pulp wood sales in other states, including, to a limited extent, Wisconsin. *Pulp Wood Company v. Green Bay Paper & Fiber Company,* 168 Wis. 400, 170 N.W. 230 (1919).

Given this finding, it is not at all surprising that the court believed it more appropriate to invoke the federal Sherman Act than a *Wisconsin* state antitrust

statute to deny enforcement of the contract at issue. Given the actual facts of the case, the *Pulp Wood* opinions are far from an unambiguous holding that Wisconsin antitrust law cannot apply to anticompetitive conduct implicating interstate commerce when such conduct actually does cause appreciable harm within Wisconsin.[1]

III. WISCONSIN ANTITRUST LAW FROM ITS INCEPTION HAS REACHED INTERSTATE ACTIVITY CAUSING INSTATE HARM

The Wisconsin opinions from *Pulp Wood I* to the present that have been said to preclude the application of state antitrust law to activity implicating interstate commerce do not do so. If neither the 1980 statutory changes nor *Allied Chemical* and *Milwaukee Braves* clearly establish the intended scope of state antitrust law and the scope of that law continues to be what it has been under state legislation stretching back to the 1890s, the principles reiterated in *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58 (May 25, 2004), must be applied to determine the meaning of state legislation reaching back to that time. Application of those principles establishes that Wisconsin antitrust law even at its inception in 1893 did not embody a legislative limitation on the application of

---

[1]Indeed, when the case was remanded after *Pulp Wood I*, the trial court itself did not believe that the Supreme Court had foreclosed application of Wisconsin antitrust law. On remand, the trial court found that the contract at issue was void under *both* state and federal antitrust law, as well as common law. When the case returned to the Supreme Court again, the Supreme Court neither criticized nor expressly overturned this holding by the trial court, suggesting that it meant only to hold that the federal statute was the most compelling basis for finding the challenged contract unenforceable, and not that application of the state antitrust statute was unequivocally unsustainable on the facts of the case.

state antitrust law to interstate activity causing anticompetitive harm within Wisconsin.

Wisconsin's 1893 antitrust act, the precursor of Wis. Stat. § 133.03, echoed the broad language of the federal antitrust statute in banning "[e]very contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce" in its first section. The act's second section banned monopolization and attempted monopolization of "any part of the trade or commerce in this state." L.1893, c. 219.

On its face, the 1893 statute neither expressed nor suggested any limitation barring its application to conduct implicating interstate commerce. This Court has stressed that it must be assumed that the legislature's intent "is expressed in the statutory language." *State ex rel. Kalal*, 2004 WI at ¶44. The only territorial reference in the 1893 act's prohibitions was contained in its second section banning monopolization of "any part of the trade or commerce in this state." This phrase plainly refers to what the legislature sought to protect rather than to the intrastate or interstate character of the prohibited conduct posing the threat, as was recognized by Judge Adelman in *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F.Supp.2d 959 (E.D.Wis. 1998), and has been recognized as well by courts considering "in this state" or "within this state" language in the antitrust statutes of other states. See *Heath Consultants, Inc. v. Precision Instruments, Inc.*, 247 Neb.

267, 281, 527 N.W.2d 596, 606 (Neb. 1995); *In re Microsoft Antitrust Litigation*, 2001 Me. Super. LEXIS 47, 2001 WL 1711517 (Me.Super. March 24, 2001).

This Court recently emphasized that when, as here, the "meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal*, 2004 WI at ¶45, quoting *Seider v. O'Connell*, 236 Wis.2d 211, 232, 612 N.W.2d 659 (2000).

In *State ex rel. Kalal*, this Court stated that extrinsic evidence of interpretation such as legislative history generally "need not be and is not consulted except to resolve an ambiguity in the statutory language, although legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation." *State ex rel. Kalal*, 2004 WI at ¶51. In the absence of more direct evidence of the state legislative deliberations leading to passage of the 1893 act, evidence of the broader historical context in which Wisconsin first enacted its antitrust legislation becomes especially valuable to confirm the purposes embodied in early state antitrust legislation.

Passage of Wisconsin's first antitrust act was part of a broader pattern of state activity designed to address acute public concerns over the dramatic expansion of cartelization, combination, and monopolization in late-nineteenth and early-twentieth century America. See Hans Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* 155-63 (1955). Even before the 1890 passage of the Sherman Act, at least thirteen states enacted their own antitrust measures. By 1900, the number of states and territories adopting such statutes rose

to twenty-seven, reaching a total of at least thirty-five states by 1915. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. Pa. L.Rev. 495, 499 (1987) (hereafter "*State Antitrust Law*"). Before enactment of the Sherman Act, six states successfully brought actions to challenge the continued intrastate activity of particular major "trusts." Between 1890 and 1902, twelve states brought a total of twenty-eight antitrust actions, while in the same period the federal government instituted a total of only nineteen antitrust suits. State enforcement actions during the Progressive Era repeatedly targeted combinations of multistate scope, and a number of state cases challenged the local implementation of interstate arrangements that also were attacked by federal antitrust authorities. *State Antitrust Law*, 500-01; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 Ohio State L.J. 257 (1989).

Despite contemporary constitutional doctrine positing sharply separate domains of state and federal regulatory authority, late nineteenth century law allowed states considerable room to attack anticompetitive activity implicating interstate commerce, and the states were not disinclined to take advantage of the opportunity. For example, contemporary constitutional law gave the states substantial authority to cancel the charters of domestic corporations and to revoke the intrastate business privileges of foreign corporations in response to ultra vires

corporate misconduct. State legislators frequently made adherence to antitrust standards a condition for acquiring or retaining a charter or business privileges and state courts fined businesses that failed to comply. *State Antitrust Law* at 510-17. As discussed in the brief filed by the University of Wisconsin Consumer Litigation Clinic, Wisconsin enacted such legislation directed at domestic corporations in 1897 and at foreign corporations in 1905.

In *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), the United States Supreme Court allowed state authorities to fine a foreign corporation because of its participation in a price-fixing conspiracy not alleged to have been formed, to have operated, or to have had any effect within Arkansas itself. The Court found that the defendant permissibly had been fined for the intrastate act of violating a state condition limiting eligibility to engage in intrastate activity, the condition being nonparticipation in a price-fixing conspiracy anywhere in the country.

More generally, while courts consistently declared that states could not constitutionally "regulate" interstate commerce, they nevertheless repeatedly allowed states considerable freedom to affect interstate commerce as a result of their regulatory activity. For example, in *Standard Oil of Kentucky v. Tennessee*, 217 U.S. 413 (1910), a unanimous United States Supreme Court upheld Tennessee's ouster of the defendant from the state despite its objection that it was being penalized for harming *interstate* competition. The defendant had induced

merchants in Gallatin, Tennessee to cancel purchase orders from a rival out-of-state oil company, in order to eliminate competition from that rival and permit the defendant to raise its prices in the state. The Court, per Justice Holmes, declared that "[t]he mere fact that it may happen to remove an interference with commerce among the States as well [as] with the rest does not invalidate it." 217 U.S. at 422.

Progressive Era courts repeatedly allowed purchasers to escape contractual liability when sued by out-of-state sellers if the sales contract forbade the defendant to carry the goods of the seller's competitors or contained other vertical restrictions on the defendant's activity, such as territorial restraints or resale price maintenance provisions. Although the sale and shipment themselves were deemed to be part of interstate commerce, the appended local restrictions were not, and their invalidity under local antitrust law was held to render the entire contract void and unenforceable. See *State Antitrust Law* at 520. Commerce clause objections also were rebuffed, for example, in *Standard Oil Co. of Kentucky v. State ex rel. Attorney General*, 107 Miss. 377, 65 So. 468 (1914), *overruled on other grounds, Mladinich v. Kohn*, 250 Miss. 138, 164 So.2d 785 (1964), in which the Mississippi Supreme Court declared that the mere fact that a foreign corporation manufactured its product out of state and shipped that product into Mississippi did not shield it from the imposition of penalties for predatory price discrimination within the state.

Although constitutional doctrine in the Progressive Era often spoke in terms of distinct realms of permissible state and federal regulatory authority, "even at

that time there was no clear demarcation between interstate and intrastate commerce and no complete exclusivity." *Sherwood v. Microsoft Corporation*, 2003 WL 21780975, 2003-2 Trade Cas. (CCH) ¶74,109 (Tenn.Ct.App. July 31, 2003).[2] The actual application of relevant constitutional law frequently was contested and constitutional case law continued to evolve throughout the period. In this setting, states did not exhibit an independent desire to limit the reach of state antitrust efforts to activity without any interstate commerce implications. They enacted broadly-worded antitrust statutes and challenged conduct with interstate implications, taking advantage of their power over corporate charters and privileges, their ability to "affect" if not "directly regulate" interstate commerce, and their authority to attack restraints of trade among interstate sellers operating in lines of business categorically classified at the time as not a part of interstate commerce. See *State v. Phipps*, 50 Kan. 609, 31 P. 1097 (1893) (insurance).

In short, the provisions of Wisconsin's 1893 "Little Sherman Act," on their face and as understood in light of relevant principles of interpretation and the historical context out of which the act arose, contain no statutory limitation on their application to interstate activity creating anticompetitive harm within Wisconsin. As the brief for the University of Wisconsin Consumer Litigation

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[2]Microsoft repeats a common misinterpretation of Senator Sherman's comments in the Senate debates preceding enactment of the Sherman Act when it quotes those comments to indicate a sharper division between intrastate and interstate commerce for state and federal regulatory purposes than in fact existed at the time. On this point, see *State Antitrust Law* at 509 & n.85.

Clinic discusses, state antitrust enactments after 1893 not only do not establish any such limitation, but confirm the legislature's desire to protect state citizens from anticompetitive conduct implicating interstate commerce.

The meaning of Wisconsin antitrust law from its inception thus is in accord with the meaning of state antitrust law in most other states. See *In re Brand Name Prescription Drugs*, 123 F.3d 599, 613 (7th Cir. 1997); *Sherwood v. Microsoft Corporation, supra*; Note, *Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce*, 54 Vanderbilt L.Rev. 1705 (2001) (hereafter "*Avoiding Impotence*").[3]

IV. STATE LAW REMAINS AN IMPORTANT SUPPLEMENT TO FEDERAL ENFORCEMENT

Affirming the plain meaning of Wisconsin's antitrust provisions ensures that those provisions are given their full, proper, and intended effect to protect Wisconsin consumers while helping to fulfill the long-established role of state antitrust law as a critical supplement to federal antitrust enforcement. As the United States Supreme Court noted in *California v. ARC America Corporation*,

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[3] As Chief Judge Posner noted in *In re Brand Name Prescription Drugs* with regard to cases that had construed Alabama antitrust law, opinions to the contrary typically "were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute, and the Constitution has since been reinterpreted." 123 F.3d at 613. The leading exceptions to this pattern are the Alabama Supreme Court's opinions in *Abbott Laboratories v. Durrett*, 746 So.2d 316 (Ala. 1999) and *Archer Daniels Midland Co. v. Seven-Up Bottling Co.*, 746 So.2d 966 (Ala. 1999), which are based on a non-empirical and non-statutory-based judicial presumption of narrow original legislative intent premised on an oversimplified conception of the state of constitutional law during the Progressive Era.

490 U.S. 93, 102 (1989), "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Indeed, the 1890 House Judiciary Committee Report in support of the Sherman Act stressed that

> No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. . . . Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the states shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.

H.R. Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890). The state's supplementary role to protect state citizens and economic markets from anticompetitive conduct not fully remedied by federal enforcement efforts remains a highly important one today, more than a century after the Sherman Act was passed. See, for example, *Avoiding Impotence, supra.*

CONCLUSION

The Wisconsin antitrust provisions apply to activity implicating interstate commerce that causes anticompetitive harm within Wisconsin, to the full extent of state authority under the Wisconsin and United States constitutions.

Dated this 16th day of June, 2004.

Respectfully submitted,

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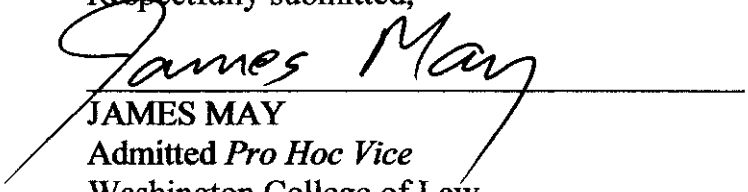
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19 (8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,988 words.

Respectfully submitted,



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SUPREME COURT OF WISCONSIN

GENE L. OLSTAD,
Individually and on behalf of
All others similarly situated

Petitioner-Respondent,

v.

MICROSOFT CORPORATION,
A foreign corporation, and
DOES 1 through 100, inclusive,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I certify that three copies of this Amicus Brief was deposited in the United States mail for delivery to W. Stuart Parsons, Esq., Quarles & Brady, 411 E. Wisconsin Ave., Milwaukee, WI 53202-4461 and John F. Maloney, McNally, Maloney & Peterson, 2600 N. Mayfair Rd. #1080, Milwaukee, WI 53226-1376 on this 16th day of June, 2004.

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STATE OF WISCONSIN
SUPREME COURT

Case No. 03-1086

GENE L. OLSTAD,
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I. LIMITING WISCONSIN'S ANTI-TRUST STATUTE TO INTRASTATE VIOLATIONS WILL HARM THE AGRICULTURE ASSOCIATIONS AND THEIR MEMBERS

The Wisconsin Farm Bureau Federation, Cooperative, the Wisconsin Federation of Cooperatives and the Wisconsin Agri-Service Association (collectively the "Agriculture Associations") represent the interests of thousands of farmers and businesses in the state that make up the largest sector of Wisconsin's economy – agriculture. The Wisconsin Farm Bureau Federation, Cooperative was founded in 1920 and is Wisconsin's largest general farm organization, consisting of more than 46,000 members. The Wisconsin Federation of Cooperatives represents more than 600 cooperative businesses (including livestock feed cooperatives) owned by more than 2.5 million Wisconsin citizens. The Wisconsin Agri-Service Association represents the interests of hundreds of feed mills, grain elevators and farm supply companies in Wisconsin.

The enforcement of Wisconsin's antitrust laws has long been of concern to the Agriculture Associations. In the late 1940s, the Federation of Cooperatives and other agricultural groups supported the funding of an antitrust division in the state attorney general's office, which brought enforcement actions to protect residents harmed by illegal conduct in

interstate commerce. See, e.g., State v. Allied Chemical & Dye, 9 Wis. 2d 290, 101 N.W. 2d 133 (1960).

Moreover, numerous state law actions have redressed harm suffered by Wisconsin's farms and agribusinesses from anti-competitive conduct. In the past decade, separate conspiracies to fix prices of bulk vitamins, lysine, methionine (all of which are used in animal feed), fertilizer, seeds, citric acid and herbicides have repeatedly injured Wisconsin's agricultural sector. (Agriculture Associations' Appendix ("Ag. App.") at 1-56). Almost all Wisconsin farms and agribusinesses are indirect purchasers of goods that have been made more expensive by unlawful anti-competitive conduct. Their sole remedy is found in Wisconsin's Antitrust Act because indirect purchasers have no standing under the federal antitrust laws. Microsoft's position would eliminate the only relief available to Wisconsin farmers and agribusinesses from antitrust violations that infect the national and global economy in which Wisconsin agriculture operates.

For example, during the late 1990's, the federal government uncovered an international price-fixing conspiracy in vitamin products, which are consumed primarily in animal feed. This conspiracy elevated vitamin prices by over 30%, reaping the conspirators billions in illegal

profits. Many of the conspirators and their executives pled guilty, paid the largest criminal antitrust fines in history and served jail sentences. (Ag. App. at 1-3). In addition to direct purchaser lawsuits commenced under federal law, actions under state antitrust statutes were brought in all states which, like Wisconsin, permit indirect purchaser claims. To date, victims of the vitamin conspiracy have recouped hundreds of millions of dollars in civil lawsuits. In Wisconsin, there is a pending indirect purchaser action involving numerous cooperatives and feed mills. Central Wisconsin Cooperative v. Akzo Nobel, Polk County, No. 02-CV-121. Also, a class action resulted in a settlement that provided for recovery by the State of Wisconsin, a consumer cy *pres* fund, and a commercial fund for claims by Wisconsin businesses. West Bend Elevator v. Hoffman LaRoche, Milwaukee County, No. 2000-CV-003503.

Microsoft's construction of the statute, eliminating the only remedy for indirect purchasers, would place Wisconsin agriculture at a distinct disadvantage to those in other states that have such protection. Farmers and agribusinesses in Minnesota, Iowa, Illinois, Michigan and California are able to recoup their massive losses from industry-wide antitrust violations under their state antitrust laws. Identically situated Wisconsin farmers and

agribusinesses would not be able to seek recovery, raising their relative cost of doing business and making them less cost-competitive.

Microsoft's statutory interpretation finds no support in the plain language of the statute and subverts the purpose of the law ("it is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition," Wis. Stat § 133.01), and is contrary to this Court's holding in State v. Allied Chemical & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960), and the great weight of authority.

II. THE 1980 WISCONSIN ANTITRUST ACT DOES NOT CARVE OUT AN "INTERSTATE COMMERCE" EXEMPTION

The plain language of the statute enacted in 1980 does not create an "interstate commerce" exemption. 1979 Wis. Laws, Ch. 209 ("1980 Act"). The 1980 Act makes illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . ." and applies to "every person" who monopolizes "any part of trade or commerce." Wis. Stat. § 133.03 (1) and (2) (emphasis added). "Person" is defined as individuals and "all corporations [or]... entities existing under the laws of this or any other state . . . or any foreign country." § 133.02(3) (emphasis added). No word in the

statute explicitly or implicitly imposes an "intrastate" limitation or creates an "interstate" exemption for persons, conspiracies or commerce.

Statutory interpretation "begins with the language of the statute." State v. Circuit Court for Dane County, 2004 WI 58, __ N.W. 2d __ (May 25, 2004). This Court has repeatedly held that "[i]f the meaning of the statute is plain, we ordinarily stop the inquiry." Id. Accord Heritage Plastics v. Rohm and Haas Co., 2004 WL 816949 (Ohio Com. Pl. 2004) (holding plain language did not create an "interstate" exemption) (Ag. App. at 57-62). Since the language of the 1980 Act is plain and unambiguous, this Court need not address Microsoft's speculations about the legislative intent in 1893 behind a now repealed statute.

III. PULP WOOD DID NOT HOLD THAT THE WISCONSIN ANTITRUST ACT IS LIMITED TO INTRASTATE COMMERCE

Although it identifies no ambiguity in the language of the 1980 Act, Microsoft focuses its statutory construction on dicta from Pulp Wood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 170 N.W. 230 (1919) ("Pulp Wood II"). Microsoft's reliance is misplaced. Pulp Wood II did not hold the Wisconsin Antitrust Act could not redress harm suffered in the state from antitrust violations occurring in interstate commerce, and did not

dismiss claims under the Wisconsin Antitrust Act on the ground the statute did not apply. The Court simply stated "[l]ittle, if any, difference is to be observed in the result of the present case whether the state or federal statutes, or both apply." Id. at 232 (emphasis added). See also Pulp Wood v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N.W. 1058, 1066 (1914) ("Pulp Wood I") (stating the same). The implication of these statements is the Court could have applied the state statute or the federal statute to the same conduct. The "judgment" affirmed by Pulp Wood II held that the "contract . . . is void because [it is] contrary to both the federal and state anti-trust statutes." 170 N.W. at 231 (emphasis added). Consequently, Pulp Wood did not hold the claimant had no cause of action under the state statute.

IV. ANY BASIS FOR AN INTRASTATE LIMITATION DISAPPEARED WITH THE REJECTION OF THE DUAL SOVEREIGNTY DOCTRINE

The references in Pulp Wood to "intrastate transactions" did not reflect a construction of Wisconsin Antitrust Act, but rather may have reflected an interpretation of the U.S. Constitution under the then-existing "dual sovereignty" doctrine. See, e.g., In re Brand Name Prescription Drugs, 123 F.3d 599, 613 (7th Cir. 1997) (Posner, J.) ("The cases thus were

not interpreting the statute; they were interpreting the Constitution as placing the upper and lower bounds on the reach of the statute . . . ").[1]

The dual sovereignty doctrine was based on a now-discarded notion that states could not regulate activity in interstate commerce. "For a half a century after the Sherman Act's passage, courts and many commentators adopted a rather facile distinction between the proper jurisdictional limits of federal and state antitrust law. Federal law applied to restraints that were 'in or affecting' interstate commerce. State law, on the other hand, applied to purely 'local' restraints." H. Hovenkamp, State Antitrust in the Federal Scheme, 58 Ind. L.J. 375, 376 (1984). See also ABA Antitrust Law Section, State Antitrust Practice and Statutes 20 (1990) (the dual sovereignty theory "postulated distinct and mutually exclusive zones of jurisdiction for the states, which exercised jurisdiction over purely intrastate matters, and the federal government, which exercised jurisdiction only over goods and services in interstate commerce").

The dual sovereignty doctrine, however, has dramatically diminished over the last seventy years. See, e.g., Exxon Mobil Corp. v. Governor of

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1 Contrary to Microsoft's suggestion that the Alabama Supreme Court made "short work" of Chief Judge Posner's analysis, Microsoft Brief at 21, n. 3, the Seventh Circuit's analysis of the decline of the dual sovereignty doctrine reflects the more cogent and more mainstream view.

Md., 437 U.S. 117, 127-29 (1978) (permitting state regulation affecting interstate commerce). "Now no one doubts that . . . state legislatures have the authority to condemn certain acts that take place outside the state. State antitrust law reaches many things 'in or affecting' interstate commerce." Hovenkamp, supra at 376. See California v. ARC America, 490 U.S. 93 (1989); Sherwood v. Microsoft Corp, 2003 WL 21780975 (Tenn. Ct. App. July 31, 2003) (thoroughly analyzing dual sovereignty doctrine and rejecting Microsoft's identical argument under the Tennessee antitrust statute) (Ag. App. at 63-95). Microsoft's argument that the 1980 Act excludes injury connected to interstate commerce is based on now-rejected jurisprudence.

V. THIS COURT HAS HELD THE WISCONSIN ANTITRUST ACT APPLIES TO INTERSTATE COMMERCE

In 1960 this Court rejected the notion Wisconsin's Antitrust Act is limited to intrastate commerce. In State v. Allied Chemical & Dye Corp., 9 Wis. 2d 290, 101 N.W. 2d 133 (1960), this Court addressed the question whether non-Wisconsin defendants whose conduct occurred wholly in interstate commerce could "be prosecuted in state courts for alleged violations of Wisconsin antitrust laws when the complained of transactions

are interstate in nature ..." (Ag. App. at 104). The Court recited the undisputed facts that the commerce was interstate in nature:

- "none of the [three moving defendants] owns, operates, or maintains any manufacturing plant, sales or other office, warehouse, or stock of calcium chloride in the state of Wisconsin;"
- "all calcium chloride sold by them is produced in Michigan and Ohio;"
- " each of the three individual defendants sells calcium chloride on a nation-wide basis at the same price per ton to all of its customers with an adjustment for freight charges;"
- "all calcium chloride sold ...[to] customers in Wisconsin is shipped f.o.b. factory in truckload or carload lots direct to the Wisconsin destination selected by the customer," and
- "after the calcium chloride leaves the factory no employee or agent of any of the three defendants handles or has any contact with it . . . ."

101 N.W. 2d at 134.

The Allied Chemical defendants, like Microsoft, relying in part on Pulp Wood, argued that the Wisconsin statute could not apply because their activities were in interstate commerce. They argued:

- "In matters of interstate commerce the authority to prohibit restraints of trade is vested solely in the Federal government." (Ag. App. at 106).

- "[T]he state and Federal governments both have power to punish restraints of trade but the state's power does not extend to interstate trade." (Id. at 107).

- "There is nothing in the Wisconsin statutes indicating an intention that the Wisconsin antitrust laws are to be applied to interstate commerce." (Id. at 108).

- "[T]he Federal antitrust laws occupy the field to the exclusion of state laws over interstate trade such as this." (Id. at 110).

Rejecting defendants' arguments, this Court held the Wisconsin Antitrust Act reached conduct occurring in interstate commerce. 101 N.W. 2d at 133-35. The Court held "the action by the federal trade commission does not amount to a pre-emption and does not preclude the state from acting under its police powers in the making and enforcement of the state statutes." Id. at 135.

Six years later, in State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W. 2d 1 (1966), this Court again rejected the argument that the Wisconsin Antitrust Act is limited to intrastate commerce. Citing Allied Chemical, the Court held "[t]he state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce . . ." Id. at 12. Ultimately, the Court applied the federal antitrust exemption for professional baseball and refused to apply state law because of the conflict it would create. Id. at 16-17.

Microsoft argues Allied Chemical can be ignored because it did not expressly overrule Pulp Wood. There was no need for this Court in Allied Chemical or Milwaukee Braves to overrule Pulp Wood. The language from Pulp Wood now relied upon by Microsoft was dicta and conflicted with other language in the Pulp Wood opinion suggesting Wisconsin law could apply to interstate activity. This Court in Allied Chemical and Milwaukee Braves applied the Wisconsin Antitrust Act to interstate commerce because nothing in the statute indicated it could not be so applied, and the Court recognized nothing in Pulp Wood established an interstate commerce exemption.

VI. THE INTERSTATE APPLICATION OF THE STATUTE WAS REINFORCED BY THE 1980 ACT

Since Allied Chemical and Milwaukee Braves, other developments have underscored the applicability of the Wisconsin Antitrust Act to interstate commerce. The Wisconsin legislature repealed the former statute and enacted a new antitrust statute effective 1980. 1979 Wis. Laws, Ch. 209. Among the more substantive changes, the legislature explicitly guaranteed a cause of action for indirect purchasers, permitted the state and political subdivisions to collect treble damages and codified a six-year statute of limitations.

Notably, the legislature also eliminated the repeated use of the phrase "in this state" found in the former Wis. Stat. § 133.01 (1977). The 1980 Act contains no geographic reference or restriction whatsoever. See Wis. Stat. § 133.03 (1998). This substantial rewriting of the Wisconsin antitrust statute clearly reaffirmed the reach of the statute to interstate commerce. Since Allied Chemical and Milwaukee Braves were the law of Wisconsin in 1980, the legislature intended the statute to reach interstate commerce. Tucker v. Marcus, 142 Wis. 2d 425, 418 N.W. 2d 818, 821 (1988) (when legislature re-enacts a statute it intends to adopt a then-existing legal interpretation as part of the statute). Cases relied upon by Microsoft are inapposite since the statutes they construed contained "in this state" restrictions. Arnold v. Microsoft Corp., No. 00-CI-00123 (Jefferson Cty. Cir. Ct., Kentucky, Order filed July 21, 2000) (limiting statute to intrastate commerce because of "in this Commonwealth" provision) (attached to Microsoft's Brief); Archer Daniels Midland Co. v. Seven-Up Bottling, 746 So. 2d 966, 989-90 (Ala. 1999)("within this state").

Microsoft notes there have been several decisions after Allied Chemical that cite Pulp Wood and state that the Wisconsin Antitrust Act only applies to intrastate transactions. (See Microsoft Brief at 8-9 and

cases cited therein.) When each of these decisions is examined, however, it is clear that none of them involved the issue of the scope of the Wisconsin Antitrust Act. In none of the cases did the courts even consider dismissing plaintiffs' claims because the alleged violations occurred in interstate commerce. Rather, each of the cases Microsoft relies on cites Pulp Wood for the proposition federal case law governs the interpretation of the Wisconsin Antitrust Act. Microsoft's reliance on these cases is highly doubtful. See Emergency One, Inc. v. Waterous Co., 23 F.Supp. 2d 959, 962 (E.D. Wis. 1998) ("these decisions reflexively restate the interstate/ intrastate distinction as a mere preface to the courts' reliance on federal cases in interpreting Wisconsin antitrust law. . . . [N]one of the above cases purports to examine the scope of state antitrust law with respect to specific allegations of interstate commerce, and thus none sheds much light on where or how the line should be drawn . . ."); In re Methionine Antitrust Litig., 2001 WL 679115 at *4 (N.D. Cal. June 11, 2001) (Ag. App. at 13) (concluding the same about this line of cases); In re Cardizem Antitrust Litig., 105 F Supp. 2d 618, 665-66 (E.D. Mich. 2000).

VII. RESTRICTING THE WISCONSIN ANTITRUST ACT TO INTRASTATE COMMERCE EFFECTIVELY NULLIFIES THE ACT

Judicially creating an interstate commerce exemption will effectively nullify the law. Practically every commercial transaction involves interstate (if not international) commerce. Wisconsin's farmers and agricultural businesses are almost always "indirect" purchasers – i.e., they did not buy the goods directly from the antitrust violator but from some person further down the distribution chain from the violator. They have no protection under the federal antitrust laws, which limit standing to "direct" purchasers. See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Under Microsoft's reading of the Wisconsin statute, Wisconsin residents and businesses will be left with no remedy.

This result also defeats the very purpose of the 1980 Act – which was intended to guarantee a remedy for indirect purchasers under Wisconsin's antitrust law. The 1980 Act was passed in reaction to Illinois Brick limiting antitrust standing under federal law to direct purchasers. This Court has noted the Wisconsin legislature "intended an interpretation that advances, not hinders, the purpose of the" state's antitrust laws. Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 650,

529 N.W. 2d 905, 910 (1995). Microsoft's statutory construction eviscerates the 1980 Act by depriving Wisconsin indirect purchasers of the only protection available to them from anti-competitive behavior.

Microsoft urges this Court to align Wisconsin with Alabama and Mississippi in construing the scope of the state's antitrust statute. (Microsoft Brief at 18-22.) Such a move would put Wisconsin in a very small minority of states. At least thirty-nine states, including Wisconsin's neighboring states of Minnesota, Iowa, Illinois, and Michigan, have applied their state antitrust law to include conduct in interstate commerce that has adverse effects within their states. See, e.g., Health Consultants, Inc. v. Precision Investments, Inc., 527 N.W. 2d 596, 606-07 (Neb. 1995) (partial listing of states). There is nothing in the language of the 1980 Act or this Court's prior decisions that compels stripping Wisconsin's farmers and agribusinesses of their only redress for antitrust injury.

CONCLUSION

The Agriculture Associations respectfully submit that the Wisconsin Antitrust Act does apply to all antitrust violations that cause economic injury in Wisconsin.

Respectfully submitted,

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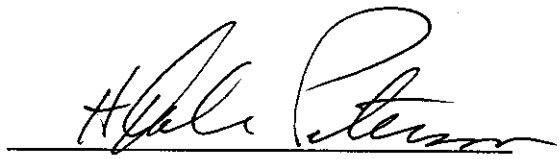
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.50(1) and § 809.19 (8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,969 words.

Dated this 16th day of June, 2004.



STATE OF WISCONSIN
SUPREME COURT

Case No. 03-1086

GENE L. OLSTAD,
Individually and on Behalf of
All Others Similarly Situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
A foreign corporation, and
DOES 1 through 100, inclusive,

Defendant-Respondent.

ON APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY KREMERS, PRESIDING
CIRCUIT COURT CASE NO. 00-CV-0003042

APPENDIX
TO NON-PARTY BRIEF OF
WISCONSIN FARM BUREAU FEDERATION, COOPERATIVE, WISCONSIN FEDERATION OF COOPERATIVES AND WISCONSIN AGRI-SERVICE ASSOCIATION

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U.S. v. F. Hoffmann-La Roche
U.S. v. Dr. Kuno Sommer
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Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, MAY 20, 1999
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AT
(202) 514-2007
TDD: (202) 514-1888

F. HOFFMANN-LA ROCHE AND BASF AGREE TO PAY RECORD CRIMINAL FINES FOR PARTICIPATING IN INTERNATIONAL VITAMIN CARTEL

F. HOFFMANN-LA ROCHE AGREES TO PAY $500 MILLION, HIGHEST CRIMINAL FINE EVER

Swiss Executive Agrees to Plead Guilty and Serve U.S. Jail Time

WASHINGTON, D.C. -- A Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd today agreed to plead guilty and pay a record $500 million criminal fine for leading a worldwide conspiracy to raise and fix prices and allocate market shares for certain vitamins sold in the United States and elsewhere, the Department of Justice announced. A German firm, BASF Aktiengesellschaft, also will plead guilty and pay a $225 million fine for its role in the same antitrust conspiracy, the Department said.

In separate one-count criminal cases filed today in U.S. District Court in Dallas, the Department of Justice charged the corporations with conspiring to fix, raise, and maintain prices, and allocate the sales volumes of vitamins sold by them and other unnamed co-conspirator companies in the U.S. and elsewhere. The cases also allege that the companies allocated contracts for vitamin premixes for customers throughout the U.S. and rigged the bids for those contracts.

The conspiracy lasted from January 1990 into February 1999 and affected the vitamins most commonly used as nutritional supplements or to enrich human food and animal feed -- vitamins A, B2, B5, C, E, and Beta Carotene. Vitamin premixes, which are used to enrich breakfast cereals and numerous other processed foods were also affected by the conspiracy, the Department said.

"These prosecutions demonstrate that we will not allow international cartels to prey on American consumers in our globalized economy," said Attorney General Janet Reno. "Those

currently engaged in or contemplating similar conduct should take note of the high cost of getting caught – $500 million is not only a record fine in an antitrust case, but it is the largest fine the Justice Department has ever obtained in any criminal case."

The Department today also charged Dr. Kuno Sommer, former Director of Worldwide Marketing, Hoffmann-La Roche Vitamins and Fine Chemicals Division, with participating in the vitamin cartel and for lying to Department investigators in 1997 in an attempt to cover-up the conspiracy. Dr. Sommer, a Swiss citizen, has agreed to submit to the jurisdiction of the U.S. District Court in Dallas, plead guilty to both charges, serve a four-month prison term, and pay a $100,000 fine.

"This conspiracy has affected more than five billion dollars of commerce in products found in every American household," said Joel I. Klein, Assistant Attorney General in charge of the Department's Antitrust Division. "During the life of the conspiracy, virtually every American consumer paid artificially inflated prices for vitamins and vitamin enriched foods in order to feed the greed of these defendants and their co-conspirators who reaped hundreds of millions of dollars in additional revenues."

Including today's cases, there have been nine prosecutions in the ongoing investigation of the worldwide vitamin industry and the latest in a series of international conspiracy cases filed by the Department's Antitrust Division in the last several years. Hoffmann-La Roche, BASF, and Sommer are cooperating with the investigation.

The Department also confirmed the announcement by Rhone-Poulenc, SA, the French Pharmaceutical Company, that it has been cooperating with the investigation under the Antitrust Division's Corporate Leniency Program. Under the Leniency Program, a company may qualify for protection from criminal prosecution if it voluntarily reports its involvement in a crime and satisfies certain other criteria.

"The cooperation of Rhone Poulenc, together with information being provided by others, led directly to the charges filed today and the decision of the defendants not to contest the charges and to cooperate with our investigation," said Gary R. Spratling, the Antitrust Division's Deputy Assistant Attorney General for criminal enforcement. "Rhone Poulenc conspired with Hoffmann-La Roche and BASF, but the information provided by Rhone Poulenc was what the Division needed to crack the largest antitrust conspiracy uncovered to date." Spratling also said that once Hoffmann-La Rouche and BASF decided to step forward and accept responsibility for their actions, they each provided a level of cooperation nothing less than exemplary.

According to the charges, Hoffmann-La Roche and BASF agreed with the world's other major vitamin manufacturers to suppress and eliminate competition in the U.S. and elsewhere. The criminal cases charge that Hoffmann-La Roche, BASF, and Sommer, with unnamed co- conspirators:

- Agreed to fix and raise prices on Vitamins A, B2, B5, C, E, Beta Carotene and vitamin premixes;
- Agreed to allocate the volume of sales and market shares of such vitamins;
- Agreed to divide contracts to supply vitamin premixes to customers in the U.S. by

rigging the bids for those contracts; and

- Participated in meetings and conversations to monitor and enforce adherence to the agreed-upon prices and market shares.

The two-count criminal case against Sommer charges him with participating in the same vitamin conspiracy and lying to the Department of Justice by providing false, fictitious and fraudulent information to investigators when he was questioned about the vitamin conspiracy.

Klein said, "The prosecution of Dr. Sommer should send the message that foreign borders will not serve as a sanctuary from prosecution for individuals who conspire to steal from U.S. businesses and consumers. Those who lie, obstruct, and attempt to cover-up the truth in our investigations will be prosecuted and punished for those crimes as well."

The defendants in all three cases are charged with violating Section One of the Sherman Act, which carries a maximum fine of $10 million for corporations, and a maximum penalty of three years imprisonment and a $350,000 fine for individuals.

Sommer was also charged with providing false statements to a government official, a violation of 18 U.S.C. § 1001, which carries a maximum penalty of five years imprisonment and a $250,000 fine.

The maximum fine for both corporations and individuals may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

At sentencing, the court will determine the appropriate sentence to be imposed under the U.S. Sentencing Guidelines and whether to accept the plea agreements and impose the agreed- upon sentences. The dollars received from this fine will be deposited into the Crime Victims Fund, which is used to provide financial compensation and direct services to victims of crime and training and technical assistance for victim advocates, criminal justice professionals, and allied professionals across the country. The fund is supported by fines paid by federal criminal offenders, not taxpayers, and is administered by the Office for Victims of Crime (OVC).

The three cases are the result of an investigation being conducted by the Antitrust Division's Dallas Field Office and the Federal Bureau of Investigation in Dallas.

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99-196

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, MARCH 26, 1997

AT
(202) 616-2771
TDD (202) 514-1888

JUSTICE DEPARTMENT'S ONGOING PROBE INTO THE FOOD AND FEED ADDITIVES INDUSTRY YIELDS $25 MILLION MORE IN CRIMINAL FINES

Investigation has Recovered More Than $195 Million in Fines

WASHINGTON, D.C.--Two international Swiss chemical companies--F. Hoffmann-La Roche Ltd. and Jungbunzlauer International AG--have agreed to plead guilty and pay criminal fines totaling $25 million for participating in an international conspiracy to fix prices and allocate market shares in the citric acid market worldwide, the Department of Justice announced today. Two of the companies' executives also agreed to plead guilty and pay criminal fines totaling $300,000 for their part in the conspiracy.

With today's fine, the Department's food and feed additives investigation has recovered more than $195 million in criminal fines.

"The Department will continue to seek out and prosecute all international conspiracies that increase prices for consumers and unfairly impede free and open competition in our markets," said Joel I. Klein, Acting Assistant Attorney General in charge of the Department's Antitrust Division.

Hoffmann-La Roche has agreed to pay $14 million and Jungbunzlauer has agreed to pay $11 million for their participation in the conspiracy.

Udo Haas, the former Managing Director of SA Citrique Belge NV--the citric acid-producing affiliate of Hoffmann-La Roche, and Rainer Bichlbauer, the Chairman and President of Jungbunzlauer, have also agreed to plead guilty and each pay a $150,000 criminal fine for their role in the international citric acid conspiracy. Haas is a German citizen and Bichlbauer is Austrian.

This is the fifth round of cases filed as a result of the Department's ongoing investigation into illegal, collusive practices in the food and feed additives industry.

In October 1996, Archer Daniels Midland Co. agreed to plead guilty and pay a $100 million criminal fine--the largest criminal antitrust fine ever--for its participation in international conspiracies involving two such additives--citric acid and lysine. In January 1997, Haarmann & Reimer Corp., a New Jersey-based subsidiary of the Germany-based pharmaceutical and chemical giant Bayer AG, agreed to plead guilty and pay a $50 million criminal fine for its participation in the citric acid conspiracy.

Today's charges mark another chapter in the Department's ongoing investigations being conducted by the San Francisco, Chicago, and Atlanta Field Offices of the Antitrust Division, the Federal Bureau of Investigation in San Francisco and Springfield, Illinois, and the U.S. Attorneys' Office in Chicago.

Citric acid is a flavor additive and preservative produced from various sugars. It is found in soft drinks, processed food, detergents, pharmaceutical and cosmetic products. Citric acid is a $1.2 billion a year industry worldwide.

The charges against Hoffmann-La Roche, Haas, Jungbunzlauer, and Bichlbauer were filed today in U.S. District Court in San Francisco. The pleading parties have authorized the government to disclose the basic terms of the plea agreements under which the charges were filed. As part of their plea agreements, which must be accepted by the court, the parties have agreed to cooperate in the ongoing government investigations.

"With our new global economy, the Antitrust Division's top priority in criminal enforcement is to investigate and prosecute international cartels that hurt American consumers," said Gary R. Spratling, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement. "Today's charges against Swiss, Austrian and German defendants, coupled with earlier food and feed additives industry cases against Japanese, Korean, German and American defendants, demonstrates that we will prosecute members of price fixing cartels wherever they are located."

The felony cases charge that Hoffmann-La Roche and Jungbunzlauer, through several of their employees, conspired with other unnamed major citric acid-producing firms, to suppress and eliminate competition in the citric acid market from July 1991 to June 27, 1995.

individuals. The fine may be increased to twice the gain derived from the crime by the defendant or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine of $10 million for corporations and $350,000 for individuals.

Since August 1996, the Department has filed charges against the following companies and executives for their roles in the lysine and citric acid conspiracies:

- Anjinomoto Co. Inc. of Tokyo, Japan pleaded guilty and agreed to pay a $10 million criminal fine, and Kanji Mimoto, its former general manager of the Feed Additives Division and current associate general manager of the International Division, pleaded guilty and was fined $75,000 for their participation in the lysine conspiracy. Mimoto lives in Japan.

- Kyowa Hakko Kogyo Co. Ltd. of Tokyo, Japan pleaded guilty and agreed to pay a $10 million criminal fine, and Masaru Yamamoto, its former general manager of the Agricultural Products Department and current general manager of the Food Division, pleaded guilty and was fined $50,000 for their participation in the lysine conspiracy. Yamamoto lives in Japan.

- Sewon America Inc., located in Paramus, New Jersey, pleaded guilty and has agreed to pay a criminal fine which will be determined by the court, and Jhom Su Kim, its president, pleaded guilty and was fined $75,000 for their participation in the lysine conspiracy. Sewon America is a subsidiary of Sewon Company Ltd., located in Seoul, South Korea. Kim is from Korea and currently lives in Ridgewood, New Jersey.

- Archer Daniels Midland Co., located in Decatur, Illinois, pleaded guilty to two felony counts for its participation in the lysine and citric acid conspiracies and was fined $100 million.

- Three former top Archer Daniels Midland executives, Michael D. Andreas, Mark E. Whitacre, and Terrance S. Wilson, and a Japanese executive, Kazutoshi Yamada were indicted for conspiring to fix prices and allocate sales in the lysine market worldwide. A trial date has yet to be set.

- Cheil Jedang Ltd., a Korean corporation, pleaded guilty and agreed to pay $1.25 million for its participation in the lysine conspiracy.

- Haarmann & Reimer Corp., a New Jersey-based subsidiary of the Germany-based pharmaceutical and chemical giant Bayer AG, pleaded guilty and was fined $50 million, and Hans Hartmann, a senior executive at the Germany-based Haarmann & Reimer Gmbh, pleaded guilty and was fined $150,000 for their participation in the citric acid conspiracy.

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97-123

H

United States District Court, N.D. California.

In re METHIONINE ANTITRUST LITIGATION, This Document Relates To: WEST BEND ELEVATOR, INC., No. 00-3961

Nos. C99-3491CRB, 00-3961.

June 11, 2001.

CLASS ACTION

BREYER, J.

MEMORANDUM AND ORDER

*1 Plaintiffs make claims under Wisconsin's antitrust statutes on behalf of all Wisconsin indirect purchasers of methionine. Defendants move to dismiss the complaint on the ground that Wisconsin's antitrust statute is limited to intrastate conspiracies and does not reach conspiracies, such as the one alleged here, that are interstate in nature. After carefully considering the papers submitted by the parties, and having had the benefit of oral argument, defendants' motion to dismiss is DENIED.

DISCUSSION

Defendants rely primarily on the Wisconsin Supreme Court's 1914 decision in *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 147 N.W. 1058 (1914), to support their contention that Wisconsin's antitrust laws are limited to anti- competitive conduct that involves wholly intrastate commerce.

A. *Pulp Wood* and its Progeny

In *Pulp Wood*, plaintiff sued for breach of a contract to pay for wood delivered to various paper mills. Defendant defended on the ground that the contract it had entered into with plaintiff was void under federal and Wisconsin antitrust statutes and therefore unenforceable. The Wisconsin Supreme Court applied federal law:

> The complaint shows that the wood supply furnished [by] the plaintiff came from the states of Wisconsin, Minnesota, and Michigan, and the Dominion of Canada. The contract we think involved interstate commerce, and if so the federal statute is applicable and the case will be treated on that basis. So far as this particular case goes, we observe very little difference whether the state or Federal statutes or both apply.

Id. at 1062 (citations omitted). The Supreme Court ultimately held that the contract did not violate the federal antitrust laws. It also held that the Wisconsin antitrust statute is a copy of the federal statute, "except that it applies to attempts to monopolize trade and commerce within the state and prescribes a lesser penalty for its violation than is provided for in the act of Congress." *Id.* at 1065.

Since *Pulp Wood* the Wisconsin Supreme Court has repeatedly and summarily stated that the Wisconsin antitrust statute applies to intrastate as distinguished from interstate commerce. *See Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 170 N.W. 230, 232 (1919) (summarizing the holding of *Pulpwood I* and commenting that "the contract in question involved interstate commerce, and hence the federal statute is the statute to be applied to the case, although little, if any, difference is to be observed in the result in the present case whether the state or the federal statutes, or both, apply"); *Reese v. Associated Hospital Service, Inc.*, 173 N.W.2d 661, 664 (1970) (Wisconsin's antitrust statute "has been held by this court to be a re-enactment of the first two sections of the federal Sherman Anti-trust Act, with application to intrastate as distinguished from interstate transactions, with its construction to be ruled by federal decisions construing the federal statute"); *John Mohr & Sons, Inc. v. Jahnke*, 198 N.W.2d 363, 367-68 (1972) ("The parts of this section making a conspiracy in restraint of trade a crime and illegal is taken from the Sherman Anti-Trust Act of 1890. It applies to intrastate instead of interstate transactions and the question of what amounts to a conspiracy in restraint of trade is controlled by federal court decisions under the

Sherman Act ."); *State v. Waste Management of Wisconsin, Inc.*, 261 N.W.2d 147, 155 (1978) ("Except for the fact that the state act applies to intrastate commerce while the federal act applies to interstate commerce, what amounts to a conspiracy in restraint of trade under the Sherman Act amounts to a conspiracy in restraint of trade under the Wisconsin antitrust act."); *Grams v. Boss*, 294 N.W.2d 473, 480 (1980) ("We have repeatedly stated that sec. 133.01, Stats., was intended as a re-enactment of the first two sections of the federal Sherman Antitrust Act of 1890, 15 U.S.C. secs. 1 and 2, with application to intrastate as distinguished from interstate transactions and that the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act."); *Independent Milk Producers Co-op v. Stoffel*, 298 N.W.2d 102, 104 (1980) ("Chapter 133 of the Wisconsin Statutes is drawn largely from federal antitrust law. Interpretation of sec. 133.01(1), Stats., prohibiting conspiracies in restraint of trade or commerce, is controlled by federal case law. The federal antitrust law, the Sherman Act, applies to interstate commerce, while the state law applies to intrastate commerce. Wisconsin case law being scarce on this issue, state courts look to the federal courts for guidance.") (citation omitted)).

*2 Defendants argue that these cases hold that Wisconsin's statute is limited to intrastate commerce; it does not apply to anti-competitive conspiracies involving interstate commerce. At least one federal district court in Wisconsin agrees. *See Maryland Staffing Services, Inc. v. Manpower, Inc.*, 936 F.Supp. 1494, 1504 (E.D.Wis.1996) (dismissing complaint brought under Wisconsin antitrust law on the ground that the complaint alleged an interstate injury).

B. *Emergency One, Inc. v. Waterous Co.*

In *Emergency One, Inc. v. Waterous Co.*, 23 F.Supp.2d 959 (E.D.Wis.1998)--a case involving alleged horizontal and vertical conspiracies to choke the market for fire pumps used on fire trucks--the defendants made the same argument as defendants here, namely, that Wisconsin's antitrust laws do not reach interstate conspiracies regardless of their impact on Wisconsin residents. The Wisconsin federal district court carefully reviewed all of the above decisions and concluded that

> these decisions reflexively restate the intrastate/interstate distinction as a mere preface to the courts' reliance on federal cases in interpreting Wisconsin antitrust law. With the possible exception of *Pulp Wood*, none of the above cases purports to examine the scope of state antitrust law with respect to specific allegations of interstate commerce, and thus none sheds much light on where or how the line should be drawn in a case like the one before [the court].

Id. at 962. The court noted that *Pulp Wood* did not unequivocally bar the simultaneous application of federal and state law, and that subsequent decisions that comment that state law applies to intrastate conspiracies and federal law to interstate conspiracies do so while explaining why federal caselaw is relevant to determinations under the state statute. *Id.* at 965.

The *Emergency One* court went on to examine two other Wisconsin Supreme Court decisions which suggest that Wisconsin's law does reach anti-competitive conspiracies involving interstate commerce. In *State v. Allied Chem. & Dye Corp.*, 101 N.W.2d 133 (1960), plaintiffs alleged a conspiracy to fix the price of calcium chloride by, among others, three out-of-state manufacturers. Defendants moved for summary judgment on the ground that they were involved exclusively in interstate commerce; the FTC had investigated and found that they had fixed the price of calcium chloride; the FTC had ordered defendants to cease fixing prices; and that since the FTC issued the order the defendants had in fact ceased fixing prices. The trial court concluded that the FTC had taken jurisdiction over the practices which the state sought to regulate and that as a result the state was precluded from enforcing its antitrust statute against the defendants. *Id.* at 135.

The Wisconsin Supreme Court reversed. The court held that

> [t]he public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy. The people of Wisconsin are entitled to the advantages that flow from free competition in the purchase of calcium chloride and other products, and if the state is able to prove the allegations made in its complaint it is apparent that the acts of the defendants deny to them those

advantages.
*3 *Id.* at 295. The *Emergency One* court observed that while *Allied Chemical* was facially about preemption, the Supreme Court's decision assumes that Wisconsin's statute reaches the defendants' conduct, that is, conduct that involves interstate commerce. *Emergency One,* 23 F.Supp.2d at 966.

A few years later, in *State v. Milwaukee Braves, Inc.,* 144 N.W.2d 1 (1966), Wisconsin sued the National League for moving the Braves baseball franchise from Milwaukee to Atlanta. A divided Wisconsin Supreme Court dismissed the action on the basis of the federal exemption of organized baseball from antitrust scrutiny. *Id.* at 12-18. The court concluded that because of the federal exemption, Wisconsin's law conflicted with federal law and therefore was preempted by the federal law. *Id.* As the *Emergency One* district court pointed out, however, "the majority left little doubt that, in the absence of the unique exemption afforded to professional baseball, acts such as those alleged in the complaint were within the purview of Chapter 133." 23 F.Supp.2d at 966. The Supreme Court noted, for example, that "[t]he state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in *interstate commerce."* 144 N.W.2d at 12 (emphasis added).

Based on these two cases the *Emergency One* court concluded that

> the Wisconsin Supreme Court has for some time interpreted the state antitrust statutes to reach interstate activities in certain circumstances and has rejected a mutually exclusive vision of state/federal antitrust enforcement. Rote reliance on the "intrastate as distinguished from interstate," *Pulp Wood* to *Grams* line of precedent to dismiss state antitrust claims with any interstate aspect is therefore misplaced and inconsistent with Wisconsin precedent.

23 F.Supp.2d at 966. The district court recognized, however, that the Supreme Court has never expressly ruled whether application of the Wisconsin statute to anti-competitive conduct involving interstate commerce is appropriate. *Id.* Accordingly, the court stated that its role is to evaluate the issue as it believes the Wisconsin Supreme Court would if required to do so.

After surveying various approaches, the court concluded that the Wisconsin Supreme Court would adopt an "adverse effects" standard to determine the jurisdictional scope of the Wisconsin statute. Under such a standard, Wisconsin's statute applies to conduct with "any significant adverse effects on trade and economic competition within Wisconsin." *Id.* at 970. Such a standard, the court reasoned, is consistent with the purpose of Wisconsin's antitrust laws and the scope of federal antitrust laws. With respect to the scope of the federal laws, the court noted that " 'it is well-established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some *substantial effect* in the United States," ' *id.* at 970 (quoting *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796 (1993)), and that federal court decisions construing the Sherman Act control application of Wisconsin antitrust law. *Id.*

C. *Emergency One* Is Persuasive

*4 The district court's reasoning in *Emergency One* is persuasive. First, and most significantly, the *Allied Chemical* and *Milwaukee Braves* Wisconsin Supreme Court decisions simply make no sense if Wisconsin's antitrust laws do not reach interstate commerce. The holding of *Milwaukee Braves*--that federal law (and, in particular, baseball's antitrust exemption) preempts Wisconsin's antitrust law--is mere dicta if Wisconsin's statute is in fact limited to wholly intrastate commerce. In other words, there can only be preemption if Wisconsin's statute creates a conflict, and there can only be a conflict if the Wisconsin statute prohibits the National League's conduct in the first place; if the statute does not apply there is no conflict. *Milwaukee Braves,* 44 N.W.2d at 12 ("the question readily arises whether there is a conflict between state and federal policy, so that the state policy must yield"). The preemption discussion in *Allied Chemical* is similarly perplexing if, as defendants contend, state law does not apply in any event.

Second, the *Pulp Wood* court did not expressly hold that Wisconsin's antitrust laws do not reach interstate commerce. The plaintiffs had brought their claims under federal *and* state law. The Supreme Court merely held that since the allegedly illegal contract involved interstate commerce, federal law was applicable and it would treat the case on that basis. *Pulp Wood,* 147 N.W. at 1062. The court next commented that there is, essentially,

no difference between state and federal law. *Id.* It did not hold that state law did not apply; there was no need for it to do so since federal law clearly applied and the result would be the same under either federal or state law. Thus, *Pulp Wood* is not inconsistent with *Emergency One's* common sense holding that Wisconsin law reaches interstate commerce with a substantial adverse effect in Wisconsin, just as the Sherman Act reaches foreign conduct with a substantial adverse effect in the United States.

Third, the other cited Supreme Court cases are also not inconsistent with *Emergency One's* holding. Each case simply routinely recites that Wisconsin law addresses intrastate conduct while federal law addresses interstate conduct in order to explain why federal case law controls. This statement is no doubt correct as a general matter; Wisconsin passed its statute, in part, to cover conduct that is not covered by federal antitrust statutes. It does not mean, however, that Wisconsin law does not cover any conduct that is also covered by the federal statutes.

Fourth, the Wisconsin legislature's 1980 amendment to its antitrust laws to permit actions by indirect purchasers is effectively meaningless if Wisconsin's antitrust laws are limited to intrastate commerce. Moreover, the fact that the amendment was added in response to the Supreme Court's restrictive interpretation of federal law, *see Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) (holding that indirect purchasers are not entitled to recover treble damages for injuries caused by price-fixing in violation of the Sherman Act), suggests the legislature intended to permit actions that could not be brought under federal law. Defendants emphasize that the legislative history of the amendment does not mention interstate versus intrastate commerce. The legislature's silence, however, equally supports the Court's interpretation of the statute; there was no need to discuss whether the statute extends to interstate commerce because the legislature assumed that it does.

*5 Accordingly, the Court concludes, as did the *Emergency One* court, that Wisconsin's antittrust statutes reach interstate conspiracies with significant adverse effects in Wisconsin.

D. Application Of The Adverse Effects Test To The Complaint

Defendants also argue that plaintiffs have not alleged that defendants' alleged conspiracy had a significant adverse effect on Wisconsin residents. In *Emergency One,* for example, the district court ultimately dismissed the complaint because it did not allege that the horizontal and vertical conspiracies had an adverse effect in Wisconsin. In particular, the court noted that plaintiffs did not allege the number of fire trucks sold to Wisconsin purchasers with prices artificially inflated by the fire pump conspiracy. *Id.* at 971. The plaintiffs were residents of Florida.

Here, in contrast, the lawsuit is brought on behalf of all Wisconsin indirect purchasers of methionine. First Amended Complaint ("FAC") ¶ 1. The FAC alleges further that the class members indirectly purchased millions of dollars of methionine from defendants, and that because of defendants' conspiracy, the class paid inflated prices for the methionine. These allegations sufficiently allege an anti-competitive conspiracy with a substantial adverse effect in Wisconsin; indeed, the lawsuit is all about Wisconsin--all of the class members are Wisconsin indirect purchasers of methionine.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

2001 WL 679115, 2001 WL 679115 (N.D.Cal.), 2001-2 Trade Cases P 73,331

END OF DOCUMENT

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	
SEMINOLE FERTILIZER CORPORATION,	)	
	)	
Defendant.	)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. &167; 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of Seminole Fertilizer Corporation in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On June 18, 1997, the United States filed a civil antitrust complaint alleging that defendant and others conspired unreasonably to restrain competition in violation of Section 1 of the Sherman Act, 15 U.S.C. &167; 1. The Complaint alleges that defendant, Norsk Hydro USA Inc.("Norsk USA"), and Farmland Industries, Inc.("Farmland") met on March 5, 1992, and discussed sharing pipeline capacity and the cost of bidding on an ammonia tank and pipeline interest, hereinafter referred to as the Tampa Facility. At the conclusion of the meeting, defendant,

Norsk USA, and Farmland reached a tentative agreement, which was later reduced to writing. The Complaint also alleges that on March 9 and March 10, 1992, defendant and Norsk USA discussed the terms of the agreement by telephone on several occasions and that they executed the written agreement two hours before the scheduled auction of the Tampa Facility on March 12, 1992. The agreement provided that defendant would give bid support of up to $2.5 million to Norsk USA, if necessary, to defeat a competing bid. In exchange, Norsk USA agreed to give defendant increased pipeline capacity if Norsk USA was the successful bidder.

This agreement had the effect of eliminating defendant, Norsk USA's chief rival, as a viable competing bidder for the Tampa Facility. Almost immediately after signing the agreement, defendant stated that it was no longer going to attend the auction of the Tampa Facility. At the auction on the afternoon of March 12, there were no bids for the Tampa Facility other than the one previously submitted by Norsk USA.

On June 18, 1997, the United States and defendant filed a Stipulation by which they consented to the entry of a proposed Final Judgment following compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. &167; 16(b)-(h). The proposed Final Judgment, as will be discussed in detail in Section IV.A., would order defendant to refrain from soliciting, entering, or attempting to enter any agreement to submit any jointly determined bids for the acquisition of any fertilizer asset (as defined in the Final Judgment) located in the United States with any

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other person that is known or reasonably should be known to defendant to be a potential bidder on the sale of that fertilizer asset. The Final Judgment would also enjoin defendant from soliciting, entering, or attempting to enter any agreement to set or establish the price or other terms and conditions of any bids for the acquisition of any fertilizer asset located in the United States.

II.
DESCRIPTION OF DEFENDANT

Defendant, a wholly owned subsidiary of Tosco Corporation, sold all of its assets in May 1993. Before its assets were sold, defendant maintained its corporate offices in Stamford, Connecticut, and was a manufacturer and distributor of phosphatic fertilizer. It operated production and storage facilities in central Florida, near Tampa.

III.
THE TAMPA FACILITY AND EVENTS LEADING UP TO THE ALLEGED VIOLATION

A. The Tampa Facility

The Tampa Facility, which consists of an ammonia terminal located in the Port of Tampa, Florida, and a one-half interest in a pipeline system connected to the ammonia terminal, [1] is used for storing, handling, and delivering anhydrous ammonia, one of the raw materials used in the manufacture of phosphatic fertilizers. Located on approximately 17-1/2 acres of land leased from the Tampa

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Port Authority, the Tampa Facility has a single tank with a 35,000 metric ton storage capacity. It services five nearby phosphatic fertilizer plants, [2] where the ammonia is combined with phosphoric acid to create diammonium phosphate. The Tampa Facility is able to service by truck or rail other phosphatic fertilizer plants not connected to it. During the early 1990's the Tampa Facility was owned by the Royster Company ("Royster"), now known as Mulberry Phosphates, Inc. ("MPI").

B. The Bankruptcy of Royster and the Failed Auction

Royster was a manufacturer of phosphatic fertilizers and related products for the domestic and export markets. Its principal facilities included a plant for the production of diammonium phosphate, located in Mulberry, Florida, and the Tampa Facility. Royster filed for bankruptcy protection on April 8, 1991, after months of experiencing financial hardships. Under the reorganization plan submitted to the Bankruptcy Court, Royster proposed to liquidate certain assets, including its Tampa Facility. Shortly after news of the potential sale of the Tampa Facility went public, Norsk USA and defendant separately expressed interest in acquiring it. After extensive negotiations with Royster officials, Norsk USA agreed to purchase the property for $15.5 million and executed an asset purchase agreement for the property on September 25, 1991. The agreement guaranteed Royster the right to purchase a continuing supply of

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ammonia from the terminal for its Mulberry plant and contained a through-put provision that permitted it to put the ammonia through the pipeline from the terminal to the plant. In November of that same year, the Bankruptcy Court ordered that the Tampa Facility be sold by auction and that bids be taken against Norsk USA's offer of $15.5 million. The auction was scheduled for March 12, 1992. It was not until the auction was announced that a third company, CF Industries ("CF") [3], publicly expressed any interest in acquiring the Tampa Facility.

On December 18, 1991, the Bankruptcy Court issued an order approving bidding procedures in connection with the proposed sale of the Tampa Facility. Any third party offer had to: (1) be substantially similar to the one contained in the Norsk USA Asset Purchase Agreement; (2) be at least $1 million more than the Norsk USA offer of $15.5 million; (3) include an offer to enter into a through-put agreement with Royster; and (4) include a confidentiality agreement with Royster and Norsk USA regarding disclosure of the terms of the Royster/Norsk USA Through-put Agreement. In addition, the Order required that the third party deposit $1 million in escrow no later than the time at which it submitted an offer. The money deposited was to remain in escrow pending the earlier of (a) the closing of the sale to the third party if its offer was approved by the Bankruptcy Court or (b) the entry of an order approving the sale of the Tampa Facility to either Norsk

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USA or another third party bidder. After depositing the $1 million, the third party was entitled to receive documents setting forth the results of the inspection of the Tampa Facility's tank, the cost of repair, the terms of the Royster/Norsk USA Through-put Agreement, and the terms of any through-put agreements submitted by any other third parties.

In February 1992, CF deposited $1 million in escrow. Defendant made its escrow deposit on March 9, 1992, three days before the auction. At the time of the auction, there were four bidders who were qualified to bid: Norsk USA, CF, defendant, and Superfos Investments Limited ("Superfos") [4]. CF informed Royster shortly before the auction that it would not be bidding, because of environmental concerns raised by a just-completed study it had done. Only Norsk USA appeared at the auction site on the afternoon of March 12 to bid on the Tampa Facility. There having been no new bids tendered, Norsk USA's standing offer of $15.5 million was accepted, pending approval by the Bankruptcy Court. In a meeting later that afternoon to finalize the details of the sale before a March 13 court hearing, Royster representatives discovered that Norsk USA and defendant had executed a joint bidding agreement approximately two hours before the auction was scheduled to begin.

At the hearing the following day, Royster representatives advised the

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Bankruptcy Court of the agreement between defendant and Norsk USA. The Bankruptcy Court deferred ratification of the sale and ordered discovery to be taken. A few days later, the Bankruptcy Court received two anonymous communications regarding the bidding agreement. One communication was a letter alleging that defendant had agreed to backstop Norsk USA's bid and that defendant's bid supplement was leaked to CF, causing them to withdraw. The letter pinpointed Steve Yurman, defendant's president, as the villain in the alleged deal. The other communication was one of defendant's internal memoranda written by Yurman describing the terms of the March 12 agreement. After reviewing the information obtained during discovery in light of the anonymous correspondence, the Bankruptcy Court, at a hearing on March 20, refused to ratify the sale of the Tampa Facility to Norsk USA and ordered that a second auction be held. At the second auction, on June 17, 1992, CF and Norsk USA submitted bids, and CF won the Tampa Facility with a final bid of $21.6 million. (By the time of the second auction, CF had been able to resolve its environmental concerns.)

C. Evidence of Collusion

On February 26, 1992, representatives of defendant, Norsk USA, and Farmland met at the Rihga Royal Hotel in New York to discuss an alleged "joint venture" proposal by defendant. The proposal involved Norsk USA buying the Tampa Facility and keeping the interest in the pipeline, but possibly selling the tank to CF. The meeting concluded with no agreements being reached.

The same parties met again on March 5, 1992, at the same hotel. They primarily discussed sharing pipeline capacity and the cost of bidding on the terminal. Specifically, Norsk USA, Farmland, and defendant proposed that Norsk USA and defendant enter into an agreement whereby defendant would supplement Norsk USA's bid and consent to Royster's transfer of its pipeline interest to Norsk USA in return for Norsk USA giving defendant extra pipeline capacity. [5] A tentative agreement was reached and Norsk USA indicated that it would have its attorneys reduce the agreement to writing and send defendant a draft to review. Norsk USA sent the first written draft to defendant on March 6, and on March 9 and March 10 representatives of Norsk USA and defendant discussed, via telephone on several occasions, the terms of the draft agreement.

On the morning of March 12, officials of Farmland, Norsk USA, Tosco, and defendant, along with their attorneys, met in Tampa, Florida, at the law offices of MacFarlane Ferguson, Norsk USA's local counsel, to resume negotiating the details of the proposed agreement. After hours of negotiations, the parties agreed, in part, that (a) defendant would supplement Norsk USA's bid up to $2.5 million and consent to Royster's assignment of its one-half interest in the pipeline lease to Norsk USA and (b) Norsk USA, in return, would give defendant the right to use an

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extra 40,000 tons of the pipeline's capacity. Almost immediately after signing the agreement, defendant stated that it was no longer attending the auction.

One of defendant's representatives appeared at the auction moments before it started and advised Royster that it was withdrawing from the bidding. Later that evening, representatives of Norsk USA and defendant talked by telephone and agreed to instruct their counsel to confer with one another to prepare for the court hearing the next day.

In this case, there was virtually no evidence of covert activity, which indicated that the subjects of the investigation were not aware of, or did not appreciate, the full consequences of their actions. This lack of covertness is one of the main reasons this case is being filed civilly rather than criminally. See Antitrust Division Manual, Section III.E., at III-12 (October 18, 1987) (Second Edition).

IV.

EXPLANATION OF PROPOSED FINAL JUDGMENT

A. Prohibited Conduct

Section IV. A. enjoins defendant from directly, indirectly, or through any joint venture, partnership, or other device, entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or soliciting any agreement, understanding, contract, or combination, either express or implied, with any other person: (1) to submit any jointly determined bids for the acquisition of any fertilizer asset located in the United States; or (2) to illegally set

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or establish the price or other terms and conditions of any bids for the acquisition of any fertilizer asset located in the United States.

Paragraph B. of Section IV. also enjoins defendant from directly, indirectly, or through any joint venture, partnership, or other device, communicating or inquiring about any intentions, decisions, or plans to refrain from bidding or to bid, including any intentions, decisions, or plans regarding any actual or proposed bid amounts, for the acquisition of any fertilizer asset located in the United States, where such communication or inquiry is to (1) any other person that is known or reasonably should be known by defendant to be a potential bidder on the sale of that fertilizer asset or (2) any other person that has announced an intention to bid on the sale of that fertilizer asset.

Paragraph C. of Section IV. enjoins the defendant from directly, indirectly, or through any joint venture, partnership, or other device, requesting, suggesting, urging, or advocating that any other person not bid on, or suggesting that it would not be profitable, desirable, or appropriate for any other person to bid on, the sale of any fertilizer asset located in the United States.

B. Compliance Program and Certification

The Final Judgment acknowledges that defendant currently is not engaged in the fertilizer business and, as a result, suspends all of defendant's compliance obligations under Section VII. of the Final Judgment until such time as defendant re-enters and engages in the fertilizer business during the term of the Final Judgment. If and when defendant re-enters the fertilizer business during the term of the Final Judgment, within thirty (30) days of re-entry defendant must establish

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and maintain for as long as it engages in the fertilizer business an antitrust compliance program which shall include designating an Antitrust Compliance Officer with responsibility for accomplishing the compliance program. The Antitrust Compliance Officer is required to, on a continuing basis, supervise the review of the current and proposed activities of the defendant to ensure that it is in compliance with the program. The Antitrust Compliance Officer is also required to (1) distribute a copy of the Final Judgment to all officers and directors, and any person who otherwise manages defendant with respect to the fertilizer business, (2) distribute in a timely manner a copy of the Final Judgment to any person who succeeds to a position described in Section VII.B.1. of the Final Judgment, (3) brief annually defendant's officers and directors engaged in the fertilizer business on the meaning and requirements of the Final Judgment and the antitrust laws, and (4) obtain annually from each officer or employee designated in Section VII.B.1. and 2. of the Final Judgment a written certification that he or she: (a) has read, understands, and agrees to abide by the terms of the Final Judgment; (b) understands that failure to comply with the Final Judgment may result in conviction for criminal contempt of court; and (c) is not aware of any violation of the Final Judgment that has not been reported to the Antitrust Compliance Officer.

Moreover, defendant is required to distribute in a timely manner a copy of the Final Judgment to any person with whom the defendant enters into discussions or negotiations for the possible submission of a joint bid for the acquisition of any fertilizer asset and file with this Court and serve upon plaintiff, within ninety (90)

days after the date of defendant's re-entry in the fertilizer business, an affidavit as

to the fact and manner of its compliance with this Final Judgment. Defendant is also required to take appropriate action to terminate or modify any activities it uncovers that violate any provision of the Final Judgment.

V.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. &167; 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. &167; 16(a), the proposed Final Judgment has no prima facie effect in any private lawsuit that may be brought against the defendant.

VI.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to John T. Orr, Chief, Atlanta Field Office, U.S. Department of Justice, Antitrust Division, 75 Spring Street, S.W., Suite 1176, Atlanta, Georgia, 30303, within the 60-day period provided by the Act. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which

remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry.

VII.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The Department considered, as an alternative to the proposed Final Judgment, litigation seeking comparable equitable relief. In the view of the Department of Justice, a trial would involve substantial cost to the United States and is not warranted because the Proposed Judgment provides relief that will remedy the violations of the Sherman Act alleged in the Complaint of the United States.

VIII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No materials and documents described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. &167; 16(b), were used in formulating the proposed Final Judgment.

Respectfully submitted,

KAREN E. SAMPSON
BELINDA A. BARNETT

Attorneys for Plaintiff
U.S. Department of Justice
Antitrust Division
75 Spring Street, S.W.
Suite 1176
Atlanta, Georgia 30303
(404) 331-7100

Date: June 16, 1997

FOOTNOTES

[1] Defendant owned the other one-half interest in the pipeline, along with a separate ammonia terminal (consisting of two ammonia tanks) that also was connected to the pipeline.

[2] If defendant had been successful in acquiring the Tampa Facility, it would have been the exclusive supplier to those five plants.

[3] CF is a cooperative which has been a major participant in the fertilizer business since the mid-1960's and has operated world-scale phosphatic fertilizer plants in Florida since 1969.

[4] Since Superfos was a major creditor of Royster, the Bankruptcy Court exempted Superfos from the $1 million escrow requirement and gave it permission to submit a credit bid. Thus, Superfos could deduct from its bid offer the amount it was owed by Royster.

[5] As owner of the other one-half interest in the Tampa Facility's pipeline lease, defendant already had the right to use 450,000 tons of the pipeline's 900,000 ton capacity.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NORSK HYDRO USA INC. and FARMLAND INDUSTRIES, INC., Defendants.	CASE NO. 98-361-CIV-T-24C

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act, 15 U.S.C. § 4, as amended, in order to prevent and restrain violations by defendants of Section 1 of the Sherman Act, 15 U.S.C. § 1, and this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1337.

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2. Defendants conduct business in the Middle District of Florida within the meaning of 15 U.S.C. § 22 and 28 U.S.C. § 1391. Some of the unlawful acts described herein were conceived, performed, or made effective within Hillsborough County, Florida.

II.

DEFENDANTS

3. Norsk Hydro USA Inc. ("Hydro") is a subsidiary of Norsk Hydro a.s ("Norsk AS"), a Norwegian corporation, which is majority owned by the Norwegian Government. Hydro is headquartered in New York City, New York, and is a holding company for various subsidiaries. One of the indirect subsidiaries of Hydro, Hydro Agri Ammonia, Inc. ("Hydro Agri"), is a wholesale distributor of ammonia headquartered in Tampa, Florida. At the time of the alleged violation, Norsk AS controlled approximately twenty-five percent of the world trade of ammonia.

4. Farmland Industries, Inc. ("Farmland") is a cooperative headquartered in Kansas City, Missouri, which provides products and services to its members, who are primarily farmers and ranchers. Through a joint venture known as Farmland Hydro Limited Partnership ("FHLP"), which Farmland formed with an affiliate of Hydro in November 1991, Farmland is also engaged in manufacturing and

distributing phosphatic fertilizers.

III.

TRADE AND COMMERCE

5. Fertilizer manufacturers purchase ammonia for use as a primary component in the production of phosphatic fertilizer. During the time of the alleged violation, phosphatic fertilizer manufacturers located in Florida, including defendants, purchased ammonia produced outside Florida and outside the United States.

6. One of the largest markets for ammonia imported into the United States is Tampa, Florida. The subject of this cause of action is the sale of an ammonia terminal and pipeline interest located in the Port of Tampa, Florida (hereinafter referred to as the Tampa Facility) and used for the delivery of ammonia to phosphatic fertilizer manufacturers. Many of the transactions related to the sale by auction of the Tampa Facility were in the flow of and substantially affected interstate and foreign trade and commerce.

7. Defendants sought to acquire the Tampa Facility in order to secure ammonia supplies from outside the United States for the FHLP fertilizer plant located in Polk County, Florida. Defendants also sought to acquire the Tampa Facility to facilitate Hydro's sales of ammonia produced by affiliates of Hydro based in Trinidad to FHLP and third parties inside the United States. During the time of

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the alleged violation, a substantial quantity of the ammonia transported through the Tampa Facility was transported through the Facility in the flow of foreign trade and commerce and in a manner substantially affecting interstate and foreign trade

and commerce.

8. Phosphatic fertilizer is sold to retailers and end-users by manufacturers and distributors throughout the United States. Manufacturers and distributors of phosphatic fertilizer, including defendants, sell or transport phosphatic fertilizer to customers located throughout the United States as well as outside the United States.

9. The business activities of the defendants were within the flow of, and substantially affected, interstate and foreign trade and commerce.

IV.

ALLEGED VIOLATION

10. During 1991 the Tampa Facility, which was then owned by the Royster Company ("Royster"), consisted of an ammonia terminal and a one-half interest in a pipeline system that was connected to the terminal. Seminole Fertilizer Corporation ("Seminole") owned the other one-half interest in the pipeline system.

11. On April 8, 1991, Royster filed for bankruptcy protection, and in December 1991 the Federal Bankruptcy Court in the Middle District of Florida,

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Tampa Division, issued an order approving overbid procedures for the sale of the Tampa Facility at auction. The auction was scheduled for March 12, 1992.

12. Representatives of defendants and Seminole met on March 5, 1992, at the Rihga Royal Hotel in New York, New York, and discussed sharing pipeline capacity and the cost of bidding on the Tampa Facility. At the conclusion of the meeting, representatives of defendants and Seminole reached a tentative agreement which was later reduced to writing.

13. On March 9 and March 10, 1992, representatives of defendant Hydro and Seminole discussed the terms of the agreement by telephone.

14. Prior to the execution of the agreement described in paragraph 15 below, representatives of Hydro and Seminole were informed that a third bidder which had completed the requirements for bidding at the auction of the Tampa Facility had withdrawn from the bidding.

15. Two hours before the scheduled auction on March 12, 1992, defendant Hydro and Seminole executed a written agreement which provided that defendant Hydro would receive bid support of up to $2.5 million from Seminole if necessary to defeat a competing bid. In exchange, defendant Hydro agreed to give Seminole increased pipeline capacity if defendant Hydro was the successful bidder. This agreement had the effect of eliminating Seminole, defendant Hydro's chief rival, as a viable competing bidder for the Tampa Facility. Almost immediately after signing

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the agreement, Seminole stated that it would not be attending the auction.

16. Moments before the beginning of the auction of the Tampa Facility, a

representative of Seminole appeared at the auction site and stated that Seminole was withdrawing from the bidding, leaving defendant Hydro as the only remaining bidder.

17. Defendants intended for the Tampa Facility to be an asset of FHLP after the Tampa Facility had been acquired by defendant Hydro.

18. Defendant Farmland participated in the negotiations leading to the March 12 agreement, assented to Hydro's execution of the agreement on its behalf as a partner in FHLP, and directly benefitted from the agreement because of its partnership with Hydro.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendants entered into an unlawful agreement in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

2. That defendants, their officers, directors, agents, employees, and successors, and all other persons acting or claiming to act on behalf of any of them, be enjoined, restrained, and prohibited for a period of ten years from, in any

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manner, directly or indirectly, soliciting, entering, or attempting to enter any agreement with any actual or potential competitor to submit any jointly determined bids for the acquisition of any asset used principally in the manufacture, processing, production, storage, distribution, or sale of ammonia ("ammonia asset") located in the United States, where:

a. The purpose or effect of any such jointly determined bid is to eliminate or suppress competition; and

b. Before or at the time of submitting any such jointly determined bids, defendants do not disclose to the seller of the ammonia asset and the person administering the sale of the asset that a jointly determined bid is being submitted, the nature of the joint bid arrangement, and with whom the joint bid is being submitted;

3. That defendants, their officers, directors, agents, employees, and successors, and all other persons acting or claiming to act on behalf of any of them, be further enjoined, restrained, and prohibited for a period of ten years from, in any manner, directly or indirectly, soliciting, entering, or attempting to enter any agreement with any actual or potential competitor to set or establish the price or other terms and conditions of any bids for the acquisition of any ammonia asset

located in the United States;

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4. That plaintiff have such other and further relief as the Court may

deem just and proper; and

5. That plaintiff recover the costs of this action.

Dated: February 19, 1998

_____/s/_____
Joel I. Klein
Assistant Attorney General

_____/s/_____
A. Douglas Melamed
Deputy Assistant Attorney General

_____/s/_____
Rebecca P. Dick
Director of Civil Non-Merger Enforcement

_____/s/_____
Nezida S. Davis
Acting Chief, Atlanta Office

_____/s/_____
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_____/s/_____
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(202) 307-2784 (fax)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

LSL BIOTECHNOLOGIES, INC.

1200 North El Dorado Place, #D-44
Tucson, Arizona 85715
Chicago, IL 60605

and

SEMINIS VEGETABLE SEEDS, INC.
20901 North Ventura Road, Suite 250
Oxnard, California 93030

and

LSL PLANTSCIENCE LLC
1200 North El Dorado Place, #D-44
Tucson, Arizona 85715

Defendants.

Civil Action
No.:_____

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this antitrust action to enjoin defendants from enforcing an agreement with Hazera Quality Seeds, Inc. ("Hazera") that prohibits Hazera from competing with defendants in the development of seeds that will grow better, long-lasting, fresh-market tomatoes for United States consumers.

1. United States consumers spend more than $4 billion each year on fresh-market tomatoes. During the summer months, most of these tomatoes are grown on farms located throughout the United States and then sold locally. During the rest of the year, however, most of those tomatoes are grown in the southern portions of the United States and in Mexico. To prevent the tomatoes from rotting before they reach consumers, farmers either pick the fruit while green and artificially ripen it (which produces tomatoes with less flavor than those ripened on the vine in the summer months), or grow special breeds of tomato that have a longer shelf-life and allow the fruit to ripen on the vine. These "long-shelf-life tomatoes" are becoming the tomato of choice during the winter months, when locally-grown tomatoes are unavailable throughout most of the United States.

2. Defendants sell the seeds that farmers use to grow fresh-market tomatoes. They sell more tomato seeds in the United States and in the rest of North America than any other company.

3. Hazera is one of the world's most successful tomato seed companies; a large percentage of all the fresh-market tomatoes consumed in Europe come from seeds it helped develop. But for the non-compete agreement that is the subject of this lawsuit, Hazera would likely be a significant competitor of defendants in North America.

4. Beginning in the early 1980's, Hazera and defendant LSL Biotechnologies, Inc. ("LSL") signed a series of contracts to work together to develop tomatoes with a longer shelf life for the American market. Those contracts expired December 31, 1995, and all that remains of them is a provision (the "Restrictive Clause") that bars Hazera from competing in North America against defendants to develop better long-shelf-life tomatoes. That ban on competition lasts *forever* and extends to tomato development efforts beyond those on which LSL and Hazera cooperated.

5. LSL has threatened to enforce the Restrictive Clause against Hazera and consequently Hazera has been deterred from adapting fresh-market, long-shelf-life tomatoes it is developing for other countries to growing conditions in the United States and Mexico.

6. The Restrictive Clause is a non-compete agreement between actual or potential competitors. It was not reasonably necessary to any legitimate joint activity between defendants and is so overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), as amended.

7. The Restrictive Clause also violates Section 1 of the Sherman Act because it has harmed and will continue to harm American consumers by unreasonably reducing competition to develop better seeds for fresh-market, long-shelf-life tomatoes for sale in the United States.

DEFENDANTS, JURISDICTION AND VENUE

8. The United States files this complaint and institutes these proceedings under Section 4 of the Sherman Act (15 U.S.C. § 4), to prevent and restrain defendants from continuing to violate Section 1 of the Sherman Act (15 U.S.C. § 1), as amended.

9. LSL is incorporated in Delaware. It is the largest seller of fresh-market tomato seeds in Mexico, from which the United States imports the largest number of fresh-market tomatoes. LSL's principal place of business is in Tucson, Arizona. On its own and through its subsidiaries, LSL maintains offices in and transacts business in Arizona.

10. Seminis Vegetable Seeds, Inc. ("Seminis") is incorporated in California. It is the largest tomato seed company in the United States. Seminis, on its own and through its subsidiaries, maintains offices in and transacts business in Arizona.

11. LSL PlantScience LLC ("LSL Plant") is incorporated in Delaware. Its principal place of business is in Tucson, Arizona. It transacts business in Arizona. Defendants LSL and Seminis are its only shareholders, each owning a 50% voting interest.

12. Defendants are engaged in interstate commerce and in activities that substantially affect interstate commerce. Defendants breed plants to produce tomatoes that can better withstand the rigors of interstate transport, and they sell the seeds for those plants in interstate commerce.

13. The Court has jurisdiction over this action and over the defendants pursuant to 28 U.S.C. §§ 1331 and 1337. Venue is proper in this district with respect to the defendants under 15 U.S.C. § 22 and 28 U.S.C. § 1391, because each of them is a corporation that may be found in or transacts business in the District of Arizona.

FACTUAL BACKGROUND

Tomato Perishability

14. Until recently, tomatoes had a short shelf life, beginning to rot within a few days of ripening. As a result, producers could sell ripe tomatoes only within a limited geographic area. During cooler months when locally-grown tomatoes are unavailable in much of the United States, growers generally found it unprofitable to allow the tomatoes to ripen on the vine on southern farms before shipping them for sale in northern supermarkets. Conventional "vine-ripened tomatoes" shipped by truck, the least costly means of shipping, would not remain in

marketable condition long enough for supermarkets to shelve them and for consumers to buy and use them. Tomatoes shipped by faster, but more expensive, means were too costly for most consumers.

15. To overcome this problem, growers generally picked, packed and shipped the tomatoes while green. Before sale, the green tomatoes were gassed with ethylene to redden them. These unripened, "gas green" tomatoes did not spoil quickly, but they developed a reputation for poor flavor, especially compared to the tomatoes grown on the vine until fully ripe during the summer months.

Efforts to Develop Tomatoes with a Longer Shelf Life

16. Hazera, incorporated in Israel, is one of the world's most prominent tomato seed companies. It sells more seeds than any other company in many important tomato producing countries, including Spain, Italy, Israel, and Turkey. Its corporate strategy focuses on the development of newer, improved tomato varieties, including those with extended shelf life. Hazera has been very successful in the European markets in which it competes, and it employs skilled breeders who have developed improved varieties of tomatoes.

17. In the early 1980's, Hazera (then called Hazera (1939) Ltd.) had been working with Hebrew University in Jerusalem to develop tomatoes with longer shelf life. Defendant LSL, which had no prior tomato breeding experience, also began to work with the university on breeding tomatoes during this time.

18. On January 1, 1983, Hazera and LSL signed a contract, agreeing to cooperate in the development of tomatoes for the U.S. market that had a longer shelf life, primarily through coordination with the Hebrew University. LSL, Hazera, and the university agreed to strive to solve the "gas green" problem by breeding tomatoes with enough shelf life after reddening on the vine (up to two weeks) to travel from growing locales in Mexico and the most southern states of the United States to the rest of the United States before spoiling. (Hazera and LSL decided not to cooperate in the development of better cherry tomatoes, greenhouse tomatoes or tomatoes with a normal shelf life).

19. In the contract, Hazera and LSL also allocated to each other territories in which they could exclusively sell (without competition from each other) both tomato seeds that they cooperatively developed and tomato seeds that they had developed on their own. LSL's exclusive territory included North America. Hazera and LSL also agreed that Hazera would supply to LSL the seeds that LSL sold in its exclusive territory.

20. Pursuant to the contract, LSL, Hazera and the university worked to develop quality tomatoes with added shelf life. They focused almost exclusively on breeding a ripening-inhibitor gene (the "RIN" gene) into tomato seeds to be grown in open fields. The goal of this arrangement was to develop tomatoes suited to United States consumers' taste.

21. Hazera, LSL and the university ultimately succeeded in breeding the RIN gene into commercially salable tomatoes. Hazera had previously agreed to assist LSL

in applying for a patent for successes related to their joint development efforts. LSL subsequently filed for and obtained a patent covering tomatoes (and tomato seeds) that use the RIN gene to obtain a longer shelf life.

22. These RIN-gene, vine-ripened tomato seeds have proved very popular. The RIN-gene tomato varieties that Hazera and LSL developed pursuant to the contract grow well in Mexican, but not United States climates. Thus, since the arrival of long-shelf-life tomatoes, Mexican farmers have seen their share of fresh, winter tomatoes sold in the United States grow significantly, mostly at the expense of United States tomato farmers.

The Restrictive Clause

23. After signing the initial contract in 1983, LSL and Hazera had contract disputes, including disagreements over the size of Hazera's exclusive sales territory. In 1987, a Hazera lawsuit against LSL led to a renegotiation of the contract and an "addendum" to the 1983 agreement that expanded Hazera's exclusive sales territory in the Mediterranean region.

24. The addendum contained the Restrictive Clause, which prohibited Hazera from competing with LSL on long-shelf-life tomatoes, even after the contract expired:

> "Subsequent to the termination of the agreement hereunder, Hazera shall not engage, directly or indirectly, alone, with others and/or through third parties, in the development, production, marketing or other activities involving tomatoes having any long-shelf-life qualities." (Paragraph k).

25. The Restrictive Clause prohibited Hazera from *ever* developing seeds for tomatoes with long-shelf-life traits after the 1983 agreement expired -- even if the tomatoes result from completely different gene sets or technologies (*e.g.*, tomatoes bred without using the RIN gene) from those that LSL and Hazera had developed cooperatively.

26. In spite of the addendum, disagreements between Hazera and LSL continued and the cooperation between the two companies largely ceased. In 1989, they again modified the contract, and in 1992, in another attempt to resolve their disputes, LSL and Hazera decided to modify the contract a final time. They agreed to ask an arbitrator to incorporate their final contract modifications into a stipulated arbitration order. The contract modifications contained in the "arbitration settlement" largely resolved disputes over the sales of tomato seeds in North America (part of LSL's exclusive territory) and did not call for any new cooperation between Hazera and LSL in the development of better long-shelf-life tomatoes.

27. The arbitration settlement reaffirmed the Restrictive Clause's prohibition against Hazera ever developing better long-shelf-life tomato seeds of any kind for North America. It also modified the Restrictive Clause with regard to North America so that Hazera could sell cherry tomato seeds and tomato seeds designed to grow in greenhouses that Hazera had previously developed without LSL's help, but only

after Hazera gave LSL the details of the sale (*i.e.*, the identity of the purchaser, the quantity sold, and the sales price) and allowed LSL to deliver the seeds.

28. On January 1, 1996, years after Hazera and LSL had ceased trying to jointly develop better tomato seeds, the 1983 agreement expired and the Restrictive Clause became effective. LSL began demanding that Hazera abide by the Restrictive Clause.

Events Since the Restrictive Clause Became Effective

29. Defendant Seminis is the largest tomato seed company in the United States. It owns, among other companies, Asgrow Seed Company, Petoseed Company, and Royal Sluis. Seminis has the largest tomato research and development budget of any seed company in the world. During the time that LSL and Hazera were working to develop seeds that would grow quality tomatoes with a long shelf life, Seminis was working to the same end.

30. In 1998, Seminis, which had not developed commercially successful long-shelf-life seeds for the North American market, decided to combine with LSL.

31. On May 28, 1998, LSL conveyed its patent rights over RIN-gene tomatoes to a newly created company called Patco, LLC ("Patco"). LSL conveyed the rest of its tomato seed-related assets, including the Restrictive Clause, to Defendant LSL Plant. Seminis, fully aware of the Restrictive Clause, purchased a 50% ownership stake in both Patco and LSL Plant. The governance agreement for LSL Plant gives both Seminis and LSL equal rights and opportunities to require LSL Plant to enforce (or block enforcement of) the Restrictive Clause against Hazera.

32. In 1999, LSL sued Hazera in Israel claiming that Hazera had breached provisions of the contracts between the two companies by, *inter alia*, working to develop firmer long-shelf life tomatoes.

THE TOMATO SEED MARKET

33. Farmers desiring to grow fresh-market tomatoes purchase seeds designed to grow fresh-market tomatoes. Fresh-market tomato seeds are bred for particular growing seasons and particular geographic climates. North American farmers cannot plant fresh-market tomato seeds in the winter season that were bred for the summer season or for other climates without appreciably diminishing yield and/or quality. The relevant market consists of seeds designed to grow fresh-market tomatoes in North America during the winter months.

34. Defendants' share of fresh market tomato seeds sold and manufactured in the relevant market likely exceeds 70%. Other than defendants and Hazera (and their respective affiliates), none of the remaining companies that have tried to breed tomatoes in North America has a significant share of the relevant market. On information and belief, Novartis and Monsanto together have less than a 20% share of the market, while all the other companies combined account for less than 10% of the relevant market.

ANTICOMPETITIVE EFFECTS

35. The Restrictive Clause limits effective competition in innovation in the relevant market by excluding forever from the market one of the few companies likely to develop seeds for growing fresh-market tomatoes for United States consumers during the winter months.

36. Although United States consumers have shown a clear preference for long-shelf-life tomatoes during the winter months, these tomatoes, which have the RIN gene, still do not taste like fully-ripe, summer-grown tomatoes.

37. Novartis, Monsanto and some of the firms with smaller shares of the relevant market have been working to breed a better winter tomato for United States consumers. Success is difficult, however. A company needs a knowledgeable and skilled tomato breeder, and there are few such breeders available. There is also a significant learning curve to become such a breeder. Additionally, a company needs time (usually several growing seasons) before it can determine whether its innovation efforts have borne fruit. Finally, breeding success is still, to a large degree, a hit or miss proposition.

38. Much of the research and development to date has focused on the RIN gene for which defendants LSL and Seminis hold patent rights. However, for the European and Mediterranean regions, Hazera has successfully worked to breed long-shelf-life tomatoes that do not incorporate the RIN gene and do not implicate defendants' patent rights.

39. Hazera is one of the few firms with the experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during the winter months. The Restrictive Clause, however, bars Hazera from ever competing to develop tomato seeds specifically adapted for North American climates.

40. LSL has threatened to enforce the Restrictive Clause against Hazera, and consequently Hazera has been deterred from adapting the fresh-market, long-shelf-life tomatoes it is developing for other countries to growing conditions in the United States and Mexico.

41. The Restrictive Clause thus delays or makes less likely innovations that will allow consumers to enjoy higher quality, better tasting winter tomatoes and that will allow United States farmers to grow long-shelf-life tomatoes. The Restrictive Clause may also allow defendants to profitably charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise could.

VIOLATION ALLEGED

42. The Restrictive Clause is an agreement between actual or potential competitors

not to compete with one another to develop seeds for long-shelf-life fresh market tomatoes for sale in the United States in violation of Section 1 of the Sherman Act. Its ban on competition lasts forever and extends to tomato development efforts beyond those on which LSL and Hazera cooperated. The Restrictive Clause was not reasonably necessary to effectuate the contemplated transaction between LSL and Hazera or achieve integrative efficiencies.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays:

1. That the above-mentioned Restrictive Clause be adjudged a violation of Section 1 of the Sherman Act.

2. That a permanent injunction be issued preventing and restraining the defendants, their successors and assignees, and all persons acting on their behalf from enforcing the Restrictive Clause.

3. That Plaintiff have such other relief as the nature of this case may require and as is just and proper to prevent the recurrence of the alleged violation and to dissipate the anticompetitive effects of the violation; and

4. That Plaintiff recover the costs of this action.

DATED this 15th day of September, 2000.

FOR PLAINTIFF UNITED STATES

"/s/"	"/s/"
Joel I. Klein Assistant Attorney General	Mary Jean Moltenbrey Director of Enforcement
"/s/"	"/s/"
John M. Nannes Deputy Assistant Attorney General	Roger W. Fones Chief Transportation, Energy & Agriculture Section

"/s/"
Donna N. Kooperstein
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United States District Court,
E.D. Missouri,
Eastern Division.

Frederick L. SAMPLE, et al., Plaintiffs,
v.
MONSANTO CO., et al., Defendants.

No. 4:01CV65RWS.

Sept. 30, 2003.

Corn and soybean farmers brought putative class action against seed companies, alleging price-fixing conspiracy as to genetically modified seed. On farmers' motion for class certification, the District Court, Sippel, J., held that: (1) farmers' counsel could have adequately represented proposed classes, but (2) alleged antitrust impact of companies' actions could not be measured on class-wide basis with common proof.

Motion denied.

West Headnotes

[1] Federal Civil Procedure ⇐161.1
170Ak161.1 Most Cited Cases

Plaintiffs in putative class action have burden to establish following certification prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[2] Federal Civil Procedure ⇐176
170Ak176 Most Cited Cases

Prerequisites for class certification must also be met with respect to each putative subclass. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[3] Federal Civil Procedure ⇐172
170Ak172 Most Cited Cases

To determine whether prerequisites for class certification have been satisfied, court must examine factual basis for plaintiff's claims, and may examine not only pleadings but also evidentiary record, including any affidavits and results of discovery. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[4] Federal Civil Procedure ⇐174
170Ak174 Most Cited Cases

Court should not decide merits of case when determining whether plaintiffs have satisfied prerequisites for class certification. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[5] Federal Civil Procedure ⇐162
170Ak162 Most Cited Cases

Court has broad discretion to determine whether action may be maintained as class action. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] Federal Civil Procedure ⇐164
170Ak164 Most Cited Cases

To meet requirement that named plaintiff fairly and adequately protect interests of class members, named plaintiff must be member of class he seeks to represent. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[7] Federal Civil Procedure ⇐164
170Ak164 Most Cited Cases

Class representative must possess same interest and suffer same injury as class members in order to fairly and adequately protect interests of class members. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[8] Federal Civil Procedure ⇐164
170Ak164 Most Cited Cases

Requirement that class representative fairly and adequately protect interests of class applies to lawyers seeking to represent class. Fed.Rules

Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[9] Federal Civil Procedure ⇐181.5
170Ak181.5 Most Cited Cases

Corn and soybean farmers who brought putative class action against seed companies, alleging price-fixing conspiracy, demonstrated that their counsel adequately represented proposed classes, as required to certify classes; conflicting nature of relief sought by proposed classes did not impede ability of counsel to adequately represent clients' interests. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[10] Federal Civil Procedure ⇐165
170Ak165 Most Cited Cases

In seeking class certification, plaintiffs have burden of demonstrating that questions of law or fact common to members of class predominate over any questions affecting only individual members. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[11] Federal Civil Procedure ⇐165
170Ak165 Most Cited Cases

Issue whether questions of law or fact common to members of class predominate over any questions affecting only individual members, as required for class certification, requires examination of underlying elements necessary to establish liability for plaintiffs' claims. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[12] Monopolies ⇐28(9)
265k28(9) Most Cited Cases

Plaintiff seeking treble damages under Clayton Act must establish both antitrust violation and fact of damage or injury. Clayton Act, § 4, 15 U.S.C.A. § 15.

[13] Monopolies ⇐28(1.4)
265k28(1.4) Most Cited Cases

To establish cognizable injury under Clayton Act, plaintiffs must prove that they suffered injury to their business or property as result of alleged violation. Clayton Act, § 4, 15 U.S.C.A. § 15.

[14] Monopolies ⇐28(7.6)
265k28(7.6) Most Cited Cases

Proof of injury in price-fixing case under Clayton Act will generally consist of some showing by plaintiff that, as result of conspiracy, he had to pay supra-competitive prices. Clayton Act, § 4, 15 U.S.C.A. § 15.

[15] Monopolies ⇐17(1.12)
265k17(1.12) Most Cited Cases

To establish antitrust impact in price-fixing case under Clayton Act, expert is required to construct hypothetical market, free of restraints and conduct alleged to be anti-competitive. Clayton Act, § 4, 15 U.S.C.A. § 15.

[16] Federal Civil Procedure ⇐181.5
170Ak181.5 Most Cited Cases

Corn and soybean farmers who brought putative class action against seed companies, alleging price-fixing conspiracy, failed to show that purported antitrust impact of companies' actions could be demonstrated on class-wide basis with common proof, as required to certify classes; genetically modified seeds at issue were not homogenous products, companies often lowered overall price of certain seeds or gave discounts or rebates to certain farmers to offset any alleged premiums, seeds were not offered for sale at uniform price, and actual prices paid by many farmers were well below companies' technology fees. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

***645** Ann D. White, Mager and White, P.C., Jenkintown, PA, John W. Barrett, Richard R. Barrett, Barrett Law Office, Lexington, MS, John Randall Patchett, Patchett Law Office, Marion, IL, Michael Straus, Straus and Boies, L.L.P., Birmingham, AL, Thomas F. Crosby, Winters and Brewster, Marion, IL, W. Gordon Ball, Knoxville, TN, William J. Ban, Vincent Briganti, Lowey and Dannenberg, White Plains, NY, Daniel E. Gustafson, Samuel D. Heins, Heins and Mills, Minneapolis, MN, Joseph F. Devereux, Jr., Richard P. Sher, Devereux and Murphy, Melissa Price Smith, Copeland and Thompson, Clayton, MO, Manuel J. Dominguez, Robert S. Palmer, Berman and Devalerio, West Palm Beach, FL, Richard S. Lewis, Michael D. Hausfeld, Cohen and Milstein, ***646** Washington, DC, Anthony J. Bolognese,

Spector and Roseman, Philadelphia, PA, Elizabeth J. Cabraser, Michael W. Sobol, Lieff and Cabraser, San Francisco, CA, Elizabeth H. Cronise, Hector D. Geribon, Lieff, Cabraser, Heimann, New York City, Irwin Levin, Cohen and Malad, Indianapolis, IN, Linda P. Nussbaum, Cohen and Milstein, Robert N. Kaplan, Kaplan and Kilsheimer, New York City, for plaintiffs.

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MEMORANDUM AND ORDER

SIPPEL, District Judge.

This matter is before the Court on plaintiffs' motion for class certification. Because I granted summary judgment on the tort claims, only the antitrust claims are before me in this case. Following extensive briefing and a two-day hearing held on April 28-29, 2003, I must deny plaintiffs' motion for class certification. My analysis follows.

Introduction

In this putative class action, corn and soybean farmers claim that defendants Monsanto, Pioneer and Syngenta conspired to fix, raise, maintain, or stabilize prices on genetically modified (GM) Roundup Ready soybean seeds and Yieldgard corn seeds in violation of the Sherman Act, 15 U.S.C. § 1 . According to the complaint, they did so by agreeing to impose a surcharge or "premium" on all purchases of Roundup Ready soybean seeds and Yieldgard corn seeds.

Plaintiffs also claim that, in furtherance of this conspiracy, Monsanto entered into an agreement with defendant Aventis to restrict the output of its Liberty Link soybean seeds, another type of herbicide-resistant soybean seed that would have competed with Roundup Ready soybeans. Plaintiffs allege that this second conspiracy was necessary to prevent the first one from being undermined.

The Proposed Classes

Plaintiffs seek to certify two antitrust classes. Based on the antitrust claims set forth in Counts I through IV of the First Amended Complaint, plaintiffs seek to certify the following class:

Class One: The Roundup Ready Soybean Seed Farmer Antitrust Class

All persons and entities (excluding Defendants and their co-conspirators, their officers, directors, and employees, and government entities) who purchased Roundup Ready soybean seeds in the United States, at any time from January 1, 1996 to the present. For purposes of this class definition, the term "Roundup Ready soybean seeds" means the seeds and permission to grow those seeds. This class includes only farmers, who purchased Roundup Ready soybean seeds (other than as distributors) or the right to grow the seeds, *directly* from one of the defendants.

Based on the antitrust claims set forth in Counts V and VI of the First Amended Complaint, plaintiffs seek to certify the following class:

Class Two: The Yieldgard Corn Seed Farmer Antitrust Class

All persons and entities (excluding Defendants and their co-conspirators, their officers, ***647** directors, and employees, and government entities) who purchased Roundup Ready soybean seeds in the United States, at any time from January 1, 1996 to the present. For purposes of this class definition, the term "Yieldgard corn seeds" means the seeds and permission to grow those seeds. This class includes only farmers, who purchased Yieldgard corn seeds (other than as distributors) or the right to grow the seeds,

directly from one of the defendants.
I will refer to these proposed classes jointly as the antitrust classes.

Class Action Standard

[1][2] Federal Rule of Civil Procedure 23(a) allows one or more individuals to sue as representative parties on behalf of a class "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a); *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir.1996); *Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349, 354 (E.D.Mo.1996). Plaintiffs have the burden to establish each of the four prerequisites: numerosity, commonality, typicality and adequacy of representation. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Rule 23(a) requirements must also be met with respect to each subclass. *Roby v. St. Louis Southwestern Railway Co.*, 775 F.2d 959, 961 (8th Cir.1985).

[3][4] The court must engage in a "rigorous analysis" to determine whether all the prerequisites of Rule 23(a) are satisfied. *Falcon*, 457 U.S. at 161, 102 S.Ct. 2364. "To determine whether the requirements of Rule 23(a) have been satisfied, the court must examine the factual basis for the plaintiff's claims and may examine not only the pleadings but also the evidentiary record, including any affidavits and results of discovery." *Sanft v. Winnebago Indust., Inc.*, 214 F.R.D. 514, 519 (N.D.Iowa 2003) (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3rd Cir.2001)). The court should not, however, decide the merits of the case. *See In re Buspirone Patent Litigation*, 210 F.R.D. 43, 56-57 (S.D.N.Y.2002). In *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir.2001), the Seventh Circuit Court of Appeals chastised the district court for accepting the allegations of the complaint as true when deciding whether to certify a class:

> The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. The reason why judges accept a complaint's factual allegations when ruling on motions to dismiss under Rule 12(b)(6) is that a motion to dismiss tests the legal sufficiency of a pleading. Its *factual* sufficiency will be tested later--by a motion for summary judgment under Rule 56, and if necessary by trial. By contrast, an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional). Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23. This would be plain enough if, for example, the plaintiff alleged that the class had 10,000 members, making it too numerous to allow joinder, see Rule 23(a)(1), while the defendant insisted that the class contained only 10 members.
>
> A judge would not and could not accept the plaintiff's assertion as conclusive; instead the judge would receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class.

Id. at 675-76 (emphasis in original). The Eighth Circuit Court of Appeals has yet to ***648** address this issue. Like the *Winnebago* court, I find the reasoning of the Seventh Circuit to be persuasive and will adopt it in this case.

[5] In addition to satisfying all the prerequisites of Rule 23(a), the proposed class must fall within one of the subcategories of Rule 23(b). *Morgan*, 169 F.R.D. at 354. Plaintiffs seek to certify the antitrust classes under Rule 23(b)(3), which permits certification if plaintiffs demonstrate that: 1) common questions predominate over any questions affecting only individual members; and 2) class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. Fed.R.Civ.P. 23(b)(3); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The Court has broad discretion to determine whether an action may be maintained as a class action. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir.1980).

Discussion

Rule 23(a): Numerosity

A class may not be certified unless the proposed class is so large that joinder of all class members would be "impracticable." Fed.R.Civ.P. 23(a)(1). Plaintiffs aver that the proposed classes include "hundreds of thousands of farmers located in various states around the nation. Joinder of all these plaintiffs is not practicable." Defendants do not dispute that plaintiffs meet the numerosity requirement, and I find that plaintiffs have satisfied this requirement with respect to the antitrust classes.

Commonality

Rule 23(a)(2) requires the presence of questions of law or fact common to the class. However, the presence of differing legal inquiries and factual discrepancies will not preclude class certification. [FN1] "Common questions are often found in antitrust price-fixing conspiracy cases, because by their nature, these cases deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy." *In re Monosodium Glutamate Antitrust Litigation,* 205 F.R.D. 229, 232 (D.Minn.2001) (internal citations and quotation marks omitted).

> FN1. The commonality inquiry under Rule 23(a) is different from the question under Rule 23(b) whether common questions predominate.

In this case, Plaintiffs allege that the common issues of law and fact in this case are whether:

1. defendants conspired to fix, raise, stabilize, or maintain Yieldgard corn seed prices;
2. defendants conspired to fix, raise, stabilize, or maintain Roundup Ready soybean seed prices;
3. defendants conspired to monopolize the herbicide resistant soybean seed market;
4. Monsanto monopolized the herbicide resistant soybean seed market;
5. any or all of the conduct alleged in the Complaint violates the Sherman Act;
6. defendants' conduct had an impact on the class members; and
7. the class-wide damages are attributable to the Defendants' conduct.

Defendants do not dispute that the commonality requirement is met under Rule 23(a)(3), and I find that there are legal issues common to the class.

Adequacy of Representation

[6][7][8] Rule 23(a)(4) requires that the named plaintiff must fairly and adequately protect the interests of class members. To meet this requirement, the named plaintiff must be a member of the class she seeks to represent. *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977); *Roby,* 775 F.2d at 961; *Tuft v. McDonnell Douglas Corp.,* 581 F.2d 1304, 1307-08 (8th Cir.1978). In addition, the class representative must ***649** possess the same interest and suffer the same injury as the class members. *Rodriguez,* 431 U.S. at 403, 97 S.Ct. 1891. The adequacy rule also applies to lawyers seeking to represent the class. *See Bradford v. AGCO Corp.,* 187 F.R.D. 600, 605 (W.D.Mo.1999).

Because I denied summary judgment on plaintiff C-K Farms' claims, I am rejecting defendants' argument that C-K Farms cannot adequately represent the antitrust classes.

Defendants also contend that plaintiffs' counsel cannot adequately represent the antitrust classes because of a conflict of interest. Essentially, defendants argue that plaintiffs' counsel has labored under a conflict of interest by representing the antitrust plaintiffs and the tort plaintiffs because the classes sought contradictory relief. In particular, the tort plaintiffs alleged "contamination" by the same seeds that the antitrust farmers currently grow and, through this lawsuit, seek to grow at a cheaper price. Plaintiffs' tort claims also requested injunctive relief to prevent the sale and distribution of genetically modified seed without adequate testing and safeguards. The antitrust plaintiffs, however, want to continue to purchase the GM-seed, and presumably, more of it at a cheaper price.

Plaintiffs' lawyers responded to the allegations about their inadequacy to serve as class counsel by seeking to withdraw as counsel for the tort plaintiffs. [FN2] I denied as moot the motion to withdraw and corresponding motion to substitute new counsel when I granted summary judgment against Sample and Naylor, the sole named class representatives for the tort claims. However, I have considered all arguments made in support or opposition to these motions as they relate to the adequacy of counsel

issue.

> FN2. Counsel also opposed the assertion on the merits and filed waivers of conflicts of interest signed by plaintiffs Sample and Naylor.

[9] This is admittedly a close call. I do not believe the issue of whether counsel can adequately represent the antitrust classes is mooted by the fact that the tort claims are no longer at issue in this case. This case has been pending in this district since 2001 after being transferred from another district court. If the conflicting nature of the relief sought by the proposed classes impeded the ability of counsel to adequately represent their clients' interests, it did so long before I granted summary judgment. On the face of the plaintiffs' complaint, the relief sought by the proposed classes seems incongruous at best and irreconcilable at worst. Strategic decisions made by counsel throughout the course of these proceedings were undoubtedly influenced by the nature of the relief sought by their clients, and defendants have raised legitimate concerns about counsel's ability to zealously prosecute the claims of both classes in this lawsuit. Nevertheless, having carefully considered this issue in light of the full record before me, I find that plaintiffs' counsel can adequately represent the proposed antitrust classes.

Plaintiffs have established the necessary prerequisites for maintaining a class action under Rule 23(a). However, I must deny class certification for failure to meet the requirements of Rule 23(b)(3).

Rule 23(b)(3): Predominance

Plaintiffs must meet all the requirements of Rule 23(a) and fall within one of the categories of Rule 23(b) to certify their antitrust claims as a class action. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). As stated above, plaintiffs seek to certify their antitrust classes under Rule 23(b)(3), the so-called "common question" or "damages" class action. To certify a class action under Rule 23(b)(3) , the Court must find that: 1) common questions predominate over any questions affecting only individual members; and 2) class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. ***650** Fed.R.Civ.P. 23(b)(3); *Amchem,* 521 U.S. at 615, 117 S.Ct. 2231. Because plaintiffs cannot meet the predominance requirement, I am not authorized to certify the proposed classes.

[10][11][12] In seeking class certification, plaintiffs have the burden of demonstrating that, as required by Rule 23(b)(3), "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." This necessarily requires an examination of the underlying elements necessary to establish liability for plaintiffs' claims. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 172 (3d Cir.2001). A plaintiff seeking treble damages under of § 4 of the Clayton Act, 15 U.S.C. § 15, must establish an antitrust violation (here, the alleged conspiracy to fix prices) and the fact of damage or injury, i.e., impact. *Amerinet, Inc. v. Xerox Corp.,* 972 F.2d 1483, 1490 (8th Cir.1992); *In re MSG,* 205 F.R.D. at 232. Thus, to satisfy the "predominance" standard, plaintiffs must show that both conspiracy and impact can be proven on a systematic, class-wide basis. Plaintiffs cannot satisfy either of those prongs.

Plaintiffs have not Demonstrated that Antitrust Impact can be Measured on a Class-Wide Basis with Common Proof

[13][14][15] To establish cognizable injury under Section 4 of the Clayton Act, plaintiffs must prove that the class members suffered injury to their "business or property," i.e., impact, as a result of the violation. *See State of Alabama v. Blue Bird Body Co., Inc.,* 573 F.2d 309, 317 (5th Cir.1978); *Midwestern Machinery v. Northwest Airlines, Inc.,* 211 F.R.D. 562, 571 (D.Minn.2001). The importance of the impact requirement cannot be understated, as noted by the court in *Blue Bird:*

> In making the determination as to predominance, of utmost importance is whether impact should be considered an issue common to the class and subject to generalized proof, or whether it is instead an issue unique to each class member, and thus the type of question [that] might defeat the predominance requirement of Rule 23(b)(3).

573 F.2d at 320. "[P]roof of injury in a price-fixing case will generally consist of some

showing by the plaintiff that, as a result of this conspiracy, he had to pay supracompetitive prices ...." *Id.* at 327. To establish antitrust impact, an expert is "required to construct a hypothetical market, a but-for market, free of the restraints and conduct alleged to be anticompetitive." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir.2000) (internal quotation marks omitted).

[16] To meet their burden of proof, plaintiffs offered up expert testimony from Dr. Leitzinger. Defendants have asked me to apply the test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and to disregard his testimony. I will deny defendants' motion in *limine* as I believe it is appropriate for me to consider all evidence at this stage of the proceedings. I have considered all expert testimony offered by both sides in support of or in opposition to class certification and have afforded that testimony such weight as I deemed appropriate. However, Dr. Leitzinger's testimony does *not* show that impact can be demonstrated on a class-wide basis.

Simply put, plaintiffs *presume* class-wide impact without any consideration of whether the markets or the alleged conspiracy at issue here actually operated in such a manner so as to justify that presumption. Dr. Leitzinger *assumes* the answer to this critical issue and plaintiffs, in turn, have asked the Court to rely on this *conclusion* as support for class certification. I cannot "presume" or "assume"--much less "conclude"--class-wide impact here because the evidence submitted during the class certification hearing demonstrates that such a presumption would be improper.

First, the genetically modified seeds are not homogenous products. The market for seeds is highly individualized depending upon ***651** geographic location, growing conditions, consumer preference and other factors.

Second, plaintiffs allege that only the "premium" portion of the seed product is the result of the price-fixing scheme, but the germplasm component of the seed cannot be segregated from the rest of the seed. The evidence demonstrated that defendants and their distributors often lowered the "overall" price of certain seeds, or gave discounts or rebates to certain farmers to offset any alleged premium, and that some farmers in fact paid no premium.

Another reason that the actual prices paid by farmers cannot be determined with common proof is that the GM seeds were not offered for sale at a uniform price. Plaintiffs suggested that defendants' nationwide price lists could be used for this purpose, but the evidence offered during the certification hearing demonstrated that these lists did not reflect the actual price paid by farmers. Plaintiffs also suggested that this issue could be resolved through a "claims procedure" that would be implemented after the class certification process. This argument is meritless. The amount of premiums paid, if any, is relevant to a determination of impact, an essential element of a price-fixing claim, and is not merely an assessment of the amount of damages, which may be properly ascertained at a later time. It is clear that this determination cannot be made on a class-wide basis, but would involve a fact- intensive inquiry unique to each potential class member.

Dr. Leitzinger attempted to measure the premium by comparing the price of GM seeds to conventional seeds, but in many instances the GM seeds have no conventional counterpart. Therefore, it would be impossible to determine the amount of premium paid. In addition, Dr. Leitzinger conceded that even this calculation might not accurately affect the amount of the premium because insertion of the GM trait might affect other agronomic characteristics of the seed which might otherwise affect the price.

Plaintiffs cannot determine the "but-for" marketplace necessary to establish antitrust impact without a reliable methodology to determine the premiums paid by farmers. In fact, the evidence presented at the class certification hearing showed that supply-and-demand conditions for seed sales vary to such a great extent that the "but-for" prices could be determined only through individualized inquiries for each potential class member. These factors include growing seasons and conditions, regional varieties and farmer preferences. Common proof simply cannot be used to establish a "but-for" marketplace in this situation, particularly where the evidence showed that the actual prices paid by many farmers was well below Monsanto's technology fee. [FN3]

> FN3. Initially, plaintiffs alleged in their amended complaint that the conspiracy involved a uniform premium. However, plaintiffs and Dr. Leitzinger abandoned this theory prior to the class certification hearing, presumably because the evidence showed that such uniformity did not exist. Plaintiffs instead argued that the conspiracy was to "support" Monsanto's technology fee by charging premiums, whether uniform or varied and whatever the amount. Once again, however, this theory is flawed because it merely *assumes* class-wide impact instead of demonstrating that class-wide impact could actually be shown through the use of common proof. Dr. Leitzinger summarized his own theory with the phrase, "A rising tide floats all boats." If I were to accept this theory, there would never be a case where a court *did not* certify an antitrust class action because: 1) plaintiffs' allegations of a conspiracy must be accepted as true; and 2) class-wide impact should always be *presumed* (even if the actual market demonstrates otherwise) because the conspiracy must have affected the class because, well, it is a conspiracy. Of course, this is not the standard to prove antitrust violations. Plaintiffs' house-of-cards theory collapses under the scrutiny of Rule 23(b)(3).

Finally, I am not persuaded that the alleged conspiracy could even be proven with common evidence. The dynamics of this localized industry make it highly unlikely that the existence and workings of the alleged conspiracy could be shown through common proof.

In sum, after carefully considering all the evidence submitted during the class certification hearing, I am convinced that the impact of defendants' alleged antitrust violations cannot be shown on a class-wide basis with common proof. Instead, it is a highly individualized, fact-intensive inquiry that necessarily requires consideration of factors unique to each potential class member. The variety of GM seeds purchased, geographic ***652** location, growing conditions and the terms of purchase are all relevant to a determination of impact and cannot be shown with common proof on a class-wide basis. Plaintiffs did not meet their burden of establishing the necessary elements of Rule 23(b)(3) through the testimony of Dr. Leitzinger, whose "assumptions," "presumptions" and "conclusions" fall far short of actually *establishing* antitrust impact on a class-wide basis through common proof.

For these reasons, I find that individualized issues predominate over common questions and preclude class certification. [FN4]

> FN4. Plaintiffs' amended complaint and motion for class certification also seek class treatment of restraint of trade and monopolization claims, but counsel did not discuss these claims at the class certification hearing or present any evidence in support of certifying classes with respect to these claims. Therefore, I am denying class certification with respect to these antitrust claims as well.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for class certification on antitrust claims [# 328] is denied.

IT IS FURTHER ORDERED that defendants' motion in limine to exclude the opinions of Dr. Leitzinger [# 346] is denied.

IT IS FURTHER ORDERED that the Court will set a status conference in this matter by separate order.

218 F.R.D. 644, 2003-2 Trade Cases P 74,171

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA v. AKZO NOBEL CHEMICALS BV and ERIK ANDERS BROSTRÖM, Defendants.	No. CR 01 - 0242 INFORMATION VIOLATION: Title 15, United States Code, Section 1 (Price Fixing, Market Share Allocation) Filed: June 27, 2001 San Francisco Venue

The United States of America, acting through its attorneys, charges:

I.

DESCRIPTION OF THE OFFENSE

1. AKZO NOBEL CHEMICALS BV ("AKZO") and ERIK ANDERS BROSTRÖM are made defendants on the charge stated below.

2. From in or about September 1995 until in or about August 1999, defendants AKZO and BROSTRÖM and coconspirators entered into and engaged in

a combination and conspiracy to suppress and eliminate competition by fixing the prices and allocating the market shares of monochloroacetic acid and sodium monochloroacetate (collectively referred to as "MCAA") to be sold in the United States and elsewhere. The combination and conspiracy engaged in by the defendants and coconspirators was in unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and coconspirators, the substantial terms of which were:

(a) to agree to fix and maintain prices and to coordinate price increases for MCAA to be sold in the United States and elsewhere; and

(b) to agree to allocate among major MCAA producers the market shares of MCAA to be sold by each in the United States and elsewhere.

4. For the purpose of forming and carrying out the charged combination and conspiracy, defendants and coconspirators did those things that they combined and conspired to do, including, among other things:

(a) participating in meetings and conversations to discuss the prices and market shares of MCAA to be sold in the United States and elsewhere;

(b) agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of MCAA to be sold in the United States and elsewhere;

(c) agreeing, during those meetings and conversations, to allocate

among major producers of MCAA the market shares of MCAA to be sold in the United States and elsewhere;

(d) issuing price announcements and price quotations in accordance with the agreements reached; and

(e) exchanging information on sales of MCAA in the United States and elsewhere for the purpose of monitoring and enforcing adherence to the agreed-upon prices and market shares.

II.

DEFENDANTS AND COCONSPIRATORS

5. AKZO is a corporation organized and existing under the laws of The Netherlands. BROSTRÖM is the Sub-Business Unit Manager of AKZO's Industrial Chemicals Division. During the period covered by this Information, AKZO and BROSTRÖM were engaged in the business of producing and selling MCAA to customers in the United States and elsewhere.

6. Various corporations and individuals, not made defendants in this Information, participated as coconspirators in the offense charged in this Information and performed acts and made statements in furtherance of it.

7. Whenever in this Information reference is made to any act, deed, or transaction of any corporation, the reference means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

III.

TRADE AND COMMERCE

8. MCAA is a reactive chemical compound that is used to form a number of intermediate chemicals. Markets for MCAA and derivatives include drilling

fluids, plastic stabilizers, herbicides, and pharmaceuticals.

9. During the period covered by this Information, the defendants and coconspirators sold and distributed MCAA in a continuous and uninterrupted flow of interstate and foreign trade and commerce to customers located in states or countries other than the states or countries in which the defendants and coconspirators produced MCAA.

10. The business activities of the defendants and coconspirators that are the subject of this Information were within the flow of, and substantially affected, interstate and foreign trade and commerce.

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IV.

JURISDICTION

11. The combination and conspiracy charged in this Information was carried out within the five years preceding the filing of this Information.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

"/s/"
Charles A. James
Assistant Attorney General

"/s/"
Christopher S Crook
Chief, San Francisco Office

"/s/"
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Antitrust Division

"/s/"
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United States Attorney
Northern District of California

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
American Cyanamid Company, a corporation.	)	**DOCKET NO. C-3739**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. § 41 et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Cyanamid Company, a corporation (hereinafter "Am Cy" or "respondent"), has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent American Cyanamid Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey 07054. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, New Jersey 07940.

PARAGRAPH TWO: Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, to over 2500 retail dealers located throughout the United States. In 1995, Am Cy sold at retail more than $1 billion of its crop protection chemicals.

PARAGRAPH THREE: In 1995, Am Cy was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides. In addition, Am Cy had the second-largest share of the domestic cotton grass herbicide market.

PARAGRAPH FOUR: Respondent's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FIVE: For approximately five years beginning in 1989, Am Cy operated two rebate programs for its retail dealers. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. Pursuant to the written agreements respondent entered into with its dealers under these programs, Am Cy offered to pay the dealers substantial rebates on each sale if the dealers sold Am Cy's crop protection chemicals at or above specified minimum resale prices. The specified minimum resale prices were equal to the wholesale prices paid by the dealers for the crop protection chemical products. Under the terms of the agreements, a dealer was not entitled to, and did not receive, any rebate on sales made below the specified minimum price; therefore, sales below Am Cy's specified minimum resale prices were made at a loss to the dealer. The dealers overwhelmingly accepted Am Cy's offer by selling at or above the specified minimum prices.

PARAGRAPH SIX: Am Cy also included certain nonprice performance criteria in its C.R.O.P. and A.P.E.X. programs that could increase the amount of the rebate, but compliance with those performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. For example, if the dealer did not meet any of Am Cy's performance criteria, but sold the product at or above the specified minimum resale price, the dealer nonetheless received a rebate on that sale. On the other hand, if the dealer met all of the performance criteria, but sold the product below Am Cy's specified minimum resale price, the dealer received no rebate on that sale.

PARAGRAPH SEVEN: The purpose, effects, tendency, or capacity of the acts and practices described in PARAGRAPHS FIVE and SIX are and have been to restrain trade unreasonably and hinder competition in the provision of crop protection chemicals in the United States.

PARAGRAPH EIGHT: The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices may recur in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of May, 1997, issues its complaint against said respondent.

By the Commission, Commissioner Starek dissenting.

Donald S. Clark
Secretary

SEAL

ANALYSIS TO AID PUBLIC COMMENT ON THE PROPOSED CONSENT ORDER

The Federal Trade Commission ("the Commission") has accepted an agreement to a proposed consent order from American Home Products Corporation ("AHP"), through its wholly-owned subsidiary, American Cyanamid Company ("American Cyanamid"), located in Parsippany, New Jersey. The agreement would settle charges by the Commission that American Cyanamid violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic markets for crop protection chemicals, which are herbicides and insecticides widely used in commercial agriculture.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment concerning the consent order and any other aspect of American Cyanamid's alleged anticompetitive conduct relating to its C.R.O.P. and A.P.E.X. rebate programs. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleges that American Cyanamid has engaged in acts and practices that have unreasonably

restrained competition in the sale and distribution of crop protection chemicals in the United States. In 1995, the Commission's proposed complaint alleges, American Cyanamid sold at retail more than $1 billion of its crop protection chemicals and was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides, as well as being the second-largest domestic producer of cotton grass herbicides.

According to the complaint, American Cyanamid operated two cash rebate programs for its retail dealers for approximately five years. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. The complaint states that American Cyanamid entered into written agreements with its dealers under these programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. According to the complaint, the dealers overwhelmingly accepted American Cyanamid's rebate offer by selling at or above the specified minimum resale prices.

The complaint further alleges that the wholesale prices in the agreements were set at a level equal to the specified minimum resale prices, and because a dealer received no rebate on sales below the specified prices, those sales were made at a loss to the dealer.

The complaint further states that although American Cyanamid included certain non-price performance criteria in its rebate programs that could increase the amount of the rebate, a dealer's compliance with these performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. As examples, the complaint alleges that if a dealer met all of

American Cyanamid's performance criteria, but sold the product for less than American Cyanamid's specified minimum resale price, that dealer received no rebate on the sale. On the other hand, if the dealer met none of the performance criteria, but sold the product at or above American Cyanamid's specified minimum resale price, the dealer nonetheless received a rebate on that sale.

American Cyanamid's conditioning of financial payments on dealers' charging a specified minimum price amounted to the quid pro quo of an agreement on resale prices. In cases where this issue has arisen, both before and after the Supreme Court examined the per se rule against resale price maintenance in Monsanto and Sharp,[1] courts have treated such agreements as per se illegal. See Lehrman v. Gulf Oil Corp., 464 F.2d 26, 39, 40 (5th Cir.), cert. denied, 409 U.S. 1077 (1972) (stating that ". . . adherence to a suggested price schedule was the quid pro quo for Lehrman's receiving Gulf's TCAs [temporary competitive allowances]" and "there is no comparable justification for conditioning wholesale price support upon adherence to a schedule of minimum retail prices." (emphasis in original)); Butera v. Sun Oil Co., Inc., 496 F.2d 434, 437 (1st Cir. 1974). By offering financial inducements in return for selling at specified minimum prices, a manufacturer seeks the "acquiescence or agreement" of its dealers in a resale price-fixing scheme. Monsanto, 465 U.S. at 764 n. 9. The dealer, in turn, accepts the manufacturer's offer by selling at or above the specified minimum prices. See Isaksen v. Vermont Castings, Inc., 825 F.2d 1158, 1164 (7th Cir. 1987) (Posner, J.) (an "obvious" resale price-fixing agreement is found ". . . if [the manufacturer] had told [the dealer] that it would

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[1] Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

reduce its wholesale price to him if he raised his retail price, and [the dealer] had accepted the offer by raising his price."). See also Khan v. State Oil Co., 93 F.3d 1358, 1360-61 (7th Cir. 1996) (Posner, J.), *petition for cert. pending* (No. 96-871) (agreement on price found where dealership agreement on its face allowed dealer to charge any resale price it wished, but distributor tied financial consequences to dealers' not charging the resale prices it suggested). As a result, incentives to reduce price below the specified level were substantially affected by American Cyanamid's rebate scheme.

The rebate programs challenged in this case are unlike situations where manufacturers are permitted to condition a discount or other incentive on that discount being "passed through" to consumers, which prevents a dealer from simply "pocketing" the discount. In these types of cases, the dealer is free to sell at even lower prices than the amount of the direct "pass through" of the discount or other incentive. Discounts cannot be conditioned, therefore, on the dealers' adherence to specified minimum prices. See AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc., 705 F.2d 1203, 1206 (10th Cir. 1982), cert. denied, 461 U.S. 919 (1983) (Seagram's requirement of passing through its discount "[did] not prohibit the wholesaler from making greater reductions in price than the discount provides."). See also Acquaire v. Canada Dry Bottling Co., 24 F.3d 401, 409-10 (2d Cir. 1994); Lewis Service Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842, 845-47 (8th Cir. 1983) (because dealers could discount more than Mack's sales assistance, the court found that "the purpose of Mack's discount program [was] not to force adherence to any particular price scheme of Mack's.").

The Proposed Consent Order

Part I of the proposed order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of American Cyanamid. The order also defines the terms product, dealer and resale price.

Part II of the order contains two major operative provisions: Part II(A) deals with the specific conduct at issue in this case. It prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. Part II(B) prevents American Cyanamid from otherwise agreeing with its dealers generally to control or maintain resale prices.

Neither of these provisions should be construed to prohibit lawful cooperative advertising programs or "pass through" discount programs that are not otherwise part of an unlawful resale price maintenance scheme. The Commission has previously determined that order provisions prohibiting agreements on resale prices do not restrict a company's ability to implement otherwise lawful cooperative advertising and "pass through" rebate plans because such programs do not, in themselves, constitute agreements on resale prices. See, e.g., In Re Magnavox Co., 113 F.T.C. 255, 263, 269-70 (1990).

Part III of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall include a statement, posted clearly and conspicuously, on any price list, advertising, catalogue or other promotional material where it has suggested a resale price for any product to any dealer. The required statement explains that while American Cyanamid may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell American Cyanamid's products.

Part IV of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall mail the letter attached to the order as Exhibit A and a copy of this order to all of its current dealers, distributors, officers, management employees, and agents or representatives with sales or policy responsibilities for American Cyanamid's products. American Cyanamid also must mail the letter and order to any new dealer, distributor or employee in the above positions within thirty (30) days after the commencement of that person's affiliation or employment with American Cyanamid. All of the above dealers, distributors and employees must sign and return a statement to American Cyanamid within thirty (30) days of receipt that acknowledges they have read the order and that they understand that non-compliance with the order may subject American Cyanamid to penalties for violation of the order.

Part V of the order requires that American Cyanamid file with the Commission an annual verified written report giving the details of the manner and form in which American Cyanamid is complying and has complied with the order. In addition, Part V of the order also requires American Cyanamid to maintain and make available to the Commission upon reasonable notice all records of communications with dealers, distributors, and agents or representatives relating to resale prices in the United States, as well as records of any action taken in connection with activities covered by the rest of the order. Finally, American Cyanamid must inform the Commission at least thirty (30) days before any proposed changes in the corporation, such as dissolution or sale.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Common Pleas of Ohio.

HERITAGE PLASTICS INC Plaintiff
v.
ROHM AND HAAS COMPANY Defendant

No. 03 CV 0113.

Feb. 27, 2004.

Background: Plaintiff brought price-fixing action, alleging violation of Valentine Act. Defendants filed motion to dismiss for failure to state a claim.

Holding: The Court of Common Pleas, Belmont County, No. 03 CV 0113, John M. Solovan, II, J., held that plaintiff's allegations of an interstate conspiracy to fix prices could be brought under Valentine Act.
Motion denied.

Monopolies ⚿0

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Plaintiff's allegations of an interstate conspiracy to fix prices could be brought under state's Valentine Act, and were not required to be brought under federal Sherman Act; clear and unambiguous language of Valentine Act encompassed all restrictions of commerce, without reference to interstate or intrastate issues, Valentine Act was modeled after Sherman Act, and was intended to be interpreted similarly, state antitrust law was not completely preempted by federal law, and state court had concurrent jurisdiction over issues of interstate antitrust violations. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; R.C. § 1331.01(B).

JUDGMENT ENTRY

SOLOVAN, J.

*1 Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to Civ. R. 12(B)(6), for Failure to State a Claim Upon Which Relief can be Granted, is Overruled.

This matter shall proceed to discovery of issues concerning the establishment of a class, based upon the pleadings submitted.

FINDINGS OF THE COURT

All Defendants herein have joined to dismiss Plaintiff's Complaint pursuant to Civ. R. 12(B)(6), for Failure to State a Claim Upon Which Relief can be Granted. Defendants assert that Plaintiff's Claim of an alleged interstate, and potentially International, conspiracy is beyond the scope of the Valentine Act, which regulates only intrastate commerce. *List v. Burley Tobacco Growers' Co-Op Assn.* (Ohio, 1926), 115 Ohio State 361 Rather, Defendants urge that the Valentine Act, though patterned after the federal Sherman Act, operates in a separate economic sphere from the conduct addressed by the federal act. While the Sherman Act regulates "commerce among the several states, or with foreign nations," (15 U.S.C. § 1), the Valentine Act "did the same for intrastate commerce in Ohio." *Bulova Watch Co. Inc. v. Ontario Store of Columbus, Ohio, Inc.* (Ohio C.P.1961), 176 N.E.2d 527, 86 Ohio Law Abs. 585, 587 Therefore, Defendants conclude that the federal Sherman Act (which has been invoked in seven separate cases in Federal District Court in Philadelphia, Pennsylvania) regulates interstate commerce and, since Plaintiff's Complaint seeks redress from alleged conduct that is international, it is beyond the sphere of activity envisioned for the Valentine Act and should be dismissed.

Plaintiff retorts that, according to Defendants theory of law, the bigger and broader the

conspiracy, the more immune Defendants are to liability under Ohio antitrust law, and that it was not, nor has it been, nor would it ever be the intent of the Ohio legislature to limit Ohio's antitrust statute solely to intrastate commerce. They assert that the Valentine Act, like the Sherman Act, applies to the type of conduct alleged in Plaintiff's Complaint, which was perpetrated both in and beyond Ohio borders and caused injuries to Ohio persons and entities.

The Court, in ruling upon Defendants Motion to Dismiss pursuant to Civ. R. 12(B)(6), must consider these extensive and legally complex arguments in light of the standard for dismissal of a complaint for failure to state a claim upon which relief must be granted. That standard has been set forth in *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St. 2nd 242, wherein the Ohio Supreme Court held that, in order for a Court to dismiss a complaint for failure to state a claim upon which relief may be granted, it must appear "beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *O'Brien* at 245 citing *Conley v. Gibson* (1957), 355 U.S. 41, 45, 78 S.Ct. 99, 2 L.Ed.2d 80 Therefore, when construing such Motion to Dismiss, the Court must first presume that all factual allegations of the Complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St. 3rd 190 In view of this daunting standard, this Court cannot, at this juncture, envision that the language contained in the Valentine Act, which was patterned after the Sherman Antitrust Act and, which must be interpreted in light of federal construction of the Sherman Act (*Lee v. United Church Homes, Inc.* (1996), 115 Ohio App. 3rd 705), is inapplicable under any set of facts in this case.

*2 In reference to the application of the Valentine Act, although the Court agrees with Defendants' assertion, "the established rule is that statutes are to be read in the light of attendant circumstances and conditions, and are to be construed as they were intended to be understood, when they were passed ..." *Miller v. Fairley* (Ohio, 1943), 114 Ohio St. 327, and although the primary and paramount rule in the interpretation or construction of statutes is to ascertain, declare and give effect to the intention of the legislature (*McCormick v. Alexander*, 2 O Ops. 65), the Courts are also limited in their analysis to the construction and interpretation of statutes as they are written. *State ex rel. Myers v. Chlaramonte*, 46 OS 2nd 230 The Court, upon construing a statute, must be guided by the statute, as it exists (*Oleff v. Hodapp*, 129 OS 432); in other words, as the legislature enacted it. *State v. Jerels* (C.P.) 32 O Ops. 502 The Court has the duty to adhere to a statute as it is written and enforce its literal terms. *H.R. Johnson Constr. Co. v. Board of Education*, 16 O Misc. 99

The statutory language, if valid, is, to use the various forms of expression adopted by the courts, to be taken (*Lee v. Sturges*, 46 OS 153), followed (*Turney v. Yeoman*, 14 O 207), carried out (*Allison v. Stevens*, 23 O App. 259, 155 N.E. 652), applied (*Allen v. Tressenrider*, 72 OS 77), administered (*McCune v. Snyder*, 8 O Dec 316), and enforced (*Sturdevant v. Tuttle*, 22 OS 111), in the form enacted (*Lafayette Ben, Soc, v. Lewis*, 7 O Pt 1). It is the duty of the Court to ascertain what the statute means and execute it accordingly, and to uphold an act of the General Assembly which does not contravene any constitutional mandate. *Olen Mathenson Chemical Corp. v. Ontario Store of Price Hill, Inc.*, 9 OS 2nd 67

The law does not concern itself with the legislature's unexpressed intention (Re: *Hinton's Estate*, 64 OS 485), since, in the construction of statutes, it is the expressed legislative intent that is of importance. *State ex rel, Peters v. McCollister*, 11 O Ops. 46 Although the canons of construction are aids to the ascertainment of the legislative intent, said canons of construction must yield to expressed intent, if the same be otherwise, and must never be utilized to the extent of defeating or overriding the definite intent of the General Assembly. *Henry v. Central Nat. Bank*, 16 OS 2nd 16 Therefore, in determining legislative intent, the Court must look to the statute itself, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged, or abridged. *Detzel v. Nieberding*, 7 O Misc. 262 The question is not what the General Assembly intended to enact, but the meaning of that which it did enact. *Slingluff v. Weaver*, 66 OS 621 The criterion is not what the legislature intended, but their intent in the use of the language employed. *Baltimore & O.R. Co. v. McTeer* (Hamilton Co) 55 O App. 217, 9 N.E.2d 627

*3 It is a cardinal rule that a Court must first look

to the language of the statute itself to determine the legislative intent. *Provident Bank v. Wood,* 36 OS 2nd 101 The intention of the legislature in enacting a statute must be determined primarily from the language of the statute itself (*State ex rel. VanMatre v. Buchanan Wright,* 233), and the purpose to be accomplished, (*Henry v. Central Nat. Bank,* 16 OS 2nd 16), without deleting employed terms, or inserting that which has not been written. *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Commission,* 20 OS 2nd 125 The language of a statute is its most natural expositor. *Bates v. State,* 27 O App. 391, 161 N.E. 344 These principles are to be adhered to, notwithstanding the fact that the Court may be convinced, based upon extraneous circumstances that the legislature intended to enact something very different from that which it did enact. *D.T. Woodberry & Co. v. Berry,* 18 OS 456 If an inquiry into the language of the statute to determine the legislative intent reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly. *Provident Bank v. Wood,* 36 OS 2nd 101

Based upon the above-stated legal precedents and guidance pertaining to the construction of a statute, this Court finds, based upon the clear and unambiguous language of the Valentine Act, that its application is not limited only to intrastate commerce. R.C. § 1331.01(B) of the Valentine Act, which defines illegal trusts, is not limited to intrastate conduct. R.C. § 1331.01(B)(1) makes it illegal to "create or carry out restrictions in trade or commerce ..." without reference to the terms interstate or intrastate issues. In fact, the only time R.C. § 1331.01(B) alludes to the State of Ohio, is to make it illegal to fix the price of goods "intended for sale, barter, use, or consumption in this state...." The Court finds the statutory language plainly includes both interstate and intrastate commerce. Since the ultimate function of construction is to ascertain the legislative will, and since this Court has construed the expressed language of the statute itself to determine the legislative intent, no need exists to further construe the statute as ambiguous in accord with the canons of construction, nor should the Court resort to reading such in light of attendant circumstances when enacted, and/or the conditions set forth in *Miller v. Fairley.*

Although Ohio statutory provisions concerning antitrust matters differ in wording from the federal Sherman Act, the purposes of both statutes are similar. *Richter Concrete Corp. v. Hilltop Basic Resources Inc.* (S.D.Ohio), 547 F.Supp. 893 In enacting the Valentine Act, it is apparent that the Ohio legislature adopted the judicial construction placed by the federal courts on the similar provisions of federal law. *List v. Burley Tobacco Growers' Co-Op Assn.* (Ohio, 1926), 115 O S 361 Thus, it is appropriate for Courts to interpret the language of the Valentine Act in light of the federal judicial construction of the Sherman Act. *C.K. & J.K., Inc. v. Fairview Shopping Center Corp.,* 63 OS 2nd 201

*4 In view of the above, the Court finds that the language of R.C. § 1331.01(B), making it illegal to "create or carry out restrictions in trade or commerce ...," establishes a legislative intent to protect trade and commerce and to punish restrictions on trade or commerce without limiting such to intrastate commerce. Based upon such broad, encompassing and unambiguous language, and interpreted in light of federal judicial construction of the Sherman Act, the Court finds that the application of said statute to conduct affecting interstate commerce is not necessarily preempted by the federal antitrust laws. *Pinney Dock & Transport Co. v. Penn Central Corp.,* 1982 WL 1913 (N.D.Ohio, October 1, 1982)

Although 28 U.S.C. § 1337(a) provides "the District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade or commerce against restraints and monopolies ...", said provision, by itself, does not confer federal jurisdiction. Rather, a substantive federal law must be the source of the right the Plaintiff seeks to enforce, "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 Just when a claim "arises under an Act of Congress" has received differing interpretations from the courts. Since federal courts are courts of limited jurisdiction, there is a presumption against jurisdiction that the proponent bears the burden of rebutting. *Kokkenen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391. Although Defendants could attempt remove this case to federal court by satisfying 28 U.S.C. § 1337, they would first have to demonstrate that a particular

federal statute (Act of Congress) regulating commerce or prohibiting restraints on trade is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 Defendants have cited no law requiring application of the "complete preemption" doctrine, limiting application of state antitrust laws to intrastate commerce. Indeed, several state courts have reasoned that neither federal antitrust legislation, nor the Commerce Clause, precludes application of state antitrust laws to all interstate commerce. *Younger v. Jensen,* 26 Cal. 3rd 397; *State v. Steriling Theatres Co.,* 64 Wash 2nd 761; *Peoples Savings Bank v. Stoddard,* 359 Mich. 297, 102 N.W.2d 777; *State v. Allied Chemical & Dye Corp.,* 9 Wis. 2nd 290; *Commonwealth v. McHugh,* 326 Mass. 249, 93 N.E.2d 751. In fact, it is well settled that states can enact and enforce, through their courts, legislation which affects interstate commerce when such commerce has such local consequences. *Two Queens, Inc. v. Scoza,* 296 A.D. 2nd 302 The Court finds that the State of Ohio has the power to condemn antitrust violations that occur anywhere in the nation, provided that there are sufficient harmful effects within the state itself. The issue presented here is not one of federal preemption (this Court cannot address the jurisdiction of a federal court) or federal limitation of the scope of state legislation; rather, the issue is whether the state antitrust law (the Valentine Act) encompasses Plaintiff's claims. See *Sherwood v. Microsoft Corp.* It is apparent to this Court that Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies. State antitrust laws can be consistent with the broad purposes of the federal antitrust laws, i.e. deterring anticompetitive conduct and ensuring the compensation of victims of that conduct. *Id.* This Court finds that antitrust law is a field in which Congress has not sought to replace state with federal law. In Re: *Brand Name Prescription Drugs Antitrust Litig.,* 123 F 3rd 599 (7th Cir.1997) Although the U.S. Supreme Court has not explicitly held that state antitrust statues may apply to matters involving both intrastate and interstate commerce, it has upheld application of state antitrust laws in cases in which those laws clearly affected interstate commerce. *California v. ARC America Corp.,* 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86; *U.S. v. Underwriters Assn.,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440; *Watson v. Buck,* 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 Moreover, several lower federal courts have expressly determined that the Commerce Clause of the U.S. Constitution does not necessarily preclude the application of state antitrust laws to interstate commerce. *Shell Oil Co. v. Younger,* 587 F 2nd 34 (9th Cir.1978); *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F 2nd 1286 (5th Cir.1971); *Mathews Conveyer Co. v. Palmer-Bee Co.,* 135 F 2nd 73 (6th Cir.1943)

***5** The interstate versus intrastate commerce issue only should be raised as a defense where it is arguable that a particular state has limited the scope of its antitrust statute by language, which impose a greater connection with, or impact upon commerce, within the state than is the general constitutionally required standard. However, the clear and unambiguous language of the Valentine Act, even though enacted in 1898, when precedent held that a state "cannot, without the consent of Congress ... regulate commerce between its people and those of those states of the union." (*Bowman v. Chicago & N.W. Ry. Co.* (1988), 125 U.S. 465), does not impose a territorial limit on the scope of the statute. Thus, it is not federal law that determines whether Ohio has jurisdiction under the Valentine Act; rather, based upon a clear interpretation of the language of the Valentine Act, it is state law that determines what degree of connection with or impact upon commerce within the state must exist. The Supreme Court of Ohio has interpreted the statutory language of the Valentine Act in light of federal construction of the Sherman Act (*C.K. & J.K., Inc. v. Fairview Shopping Center Corp.,* 63 OS 2nd 201), and the Ohio Court has adopted the interpretation of the Sherman Act by the United States Supreme Court in *Std. Oil Co. v. United States* (1911), 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, wherein the Court stated that:

> "... [T]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations ... have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restriction were obviously enacted to subserve. And it is worthy of observation ... that although the statute ... makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or properly exercised, was the most efficient means

for the prevention of the monopoly ..." [Emphasis Added]

That same rule of reason was adopted in paragraph 4 of the syllabus in *List v. Burley Tobacco Growers' Co-Op Assn.* (Ohio, 1926), 115 Ohio State 361 In *List,* while noting that the Valentine Act was written in "broader and stronger" terms than the Sherman Act, the Court pointed out that federal policy and federal cases interpreting the Sherman Act must be examined to ascertain the meaning of the Valentine Act, since it was patterned after the Sherman Act. This Court disagrees with Defendants' assertion that the Ohio Supreme Court, in *List,* held that the conduct alleged was an interstate transaction and not governed by the Ohio statute. Rather, such finding was merely dicta and the case was decided on other grounds. The same reasoning applies to those courts who may have followed the dicta set forth in *List,* including *Bulova Watch Co. Inc. v. Ontario Store of Columbus, Ohio, Inc.* (Ohio C.P.1961), 176 N.E.2d 527, 86 Ohio Law Abs. 585, 587 and *Freeman v. Miller* (Ohio Super., 1909), 9 O N.P. (N.S.) 26

***6** Generally, the Ohio Antitrust Legislation is to be construed, so far as the prohibited transactions are concerned, according to a rule of reason, rather than literally. See *List* The Valentine Act is so comprehensive and far-reaching in its expressed terms as to extend to every combination by two or more individuals by their capital, skill or acts, to create or carry on any restriction in trade or commerce, and manifestly, the rule of reason must prevail, inasmuch as there can scarcely be any agreement or contract between or a combination of persons in business that does not, directly or indirectly, affect and possibly restrain commerce. See *List* The Valentine Act declares unlawful and void any combination of capital, skill, or acts by two (2) or more persons to increase or reduce the price of merchandise or a commodity. R.C. § 1331.01(B)(2) Therefore, any combination, which tampers with price structures, is engaged in an unlawful activity. *Central Ohio Salt Co. v. Guthery,* 35 OS 666 A person injured in business or property by another person, by reason of anything forbidden or declared to be unlawful by the Valentine Act, may bring action in any court having jurisdiction and venue, without respect to the amount in controversy and recover two-fold the damages sustained as well as the costs of pursuit. R.C. § 1331.08 Though a Defendant retains a right to attempt to remove the cause to federal court, based upon a theory of preemption (a federal question) such right of removal does not necessarily prevent prosecution of the actions under the Valentine Act. *Mahon v. Somers* (C.C.Ohio), 112 F. 174

Under our system of dual sovereignty, the United States Supreme Court has consistently held that state courts have an inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. To give federal courts exclusive jurisdiction over a federal cause of action. Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction. *Tafflin v. Levitt* (1990), 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed.2d 887 Unlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive, the Sherman Antitrust Act contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong and arguably sufficient, evidence that Congress had no such intent. The states and federal government share concurrent jurisdiction over antitrust claims. *Yellow Freight System, Inc. v. Donnelly* (1990), 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 It is apparent to the Court that Plaintiff's attorneys have attempted to avoid federal jurisdiction by pleading their clients claims exclusively in reliance on state law. Defendants, unable to seek removal (for whatever reasons) to federal court by demonstrating a "complete preemption" of federal law (*Caterpillar Inc. v. Williams,* 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318), instead argue that the language of the Valentine Act does not permit Plaintiff to state such a claim and that it could not have been the intention of the legislature to so allow. The Court, having construed the express language of the Valentine Act, disagrees with Defendants assertion.

***7** Although it may be assumed that federal judges have more experience in litigation regulating commerce or prohibiting restraints on trade than state judges, such assumption is merely a factor that a Plaintiff must weigh, when deciding where to file suit; or such assumption may motivate Defendants to remove the case to federal court. However, such assumption does not effect the presumption that state courts are just as able as federal courts to adjudicate a federal cause of action. *Kremer v. Chemical Construction Corp.* (1982), 456 U.S. 461,

102 S.Ct. 1883, 72 L.Ed.2d 262

In this case Plaintiffs have urged the Court to consider that it is an Ohio corporation suing under the Valentine Act on behalf of Ohio residents, asserting violations of Ohio state law against Defendants, one of which is an Ohio corporation (thus no diversity of citizenship); and that said Plaintiff cannot file in federal court to resolve its state court claim because there is no diversity; no federal question; and no pendant jurisdiction. Although Defendants assert that the rights of this Plaintiff can be vindicated in the pending actions federal district court in Pennsylvania and they should not be burdened with duplicative litigation, this Court cannot ignore the clear and unambiguous language of the Valentine Act, which permits Plaintiff's cause of action to proceed in Belmont County, Ohio.

For all of the above stated reasons, Defendants Motions to Dismiss is Overruled.

2004 WL 816949 (Ohio Com.Pl.)

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Daniel SHERWOOD, et al.,
v.
MICROSOFT CORPORATION, et al.

No. M2000-01850-COA-R9-CV.

Jan. 31, 2001 Session.
July 31, 2003.

Appeal from the Circuit Court for Davidson County, No. 99C-3562; Walter C. Kurtz, Judge.

Leo Bearman, Jr., Memphis, Tennessee, James A. DeLanis, Richard H. Stout, Nashville, Tennessee, for the appellants, Microsoft Corporation and Does 1 through 100, inclusive.

C. Dewey Branstetter, Jr., James G. Stranch, III, George E. Barrett, Edmund L. Carey, Nashville, Tennessee, for the appellees, Daniel Sherwood, Roy Coggins and wife Sheila Coggins d/b/a Microfilm Services and William Overton, Individually and on behalf of all others similarly situated.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL , P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

OPINION

PATRICIA J. COTTRELL, J.

***1** In this appeal, Plaintiffs, purchasers of Microsoft software, sued Microsoft alleging that the company violated the Tennessee Trade Practices Act and the Tennessee Consumer Protection Act and claiming that they paid inflated prices for software due to Microsoft's alleged violations of Tennessee antitrust law. Microsoft filed a motion to dismiss arguing that Tennessee antitrust law applies to activities that are predominantly intrastate in character and that Microsoft's business is predominantly interstate. Microsoft also argued that indirect purchasers have no cause of action under the Tennessee Trade Practices Act. The trial court found that federal law does not provide a remedy for indirect purchasers in antitrust cases and, consequently, those purchasers must have a Tennessee state law remedy. The trial court denied the motion to dismiss the claims of the indirect purchasers, but because direct purchasers have a federal law remedy, dismissed the claims of the direct purchasers. We affirm in part, reverse in part, and hold: (1) indirect purchasers may bring an action for damages under the Tennessee Trade Practices Act; (2) the Tennessee Trade Practices Act applies to activity that has substantial effects on commerce within the state, and Plaintiffs have made sufficient allegations of such effects; and (3) the Tennessee Consumer Protection Act does not apply to antitrust causes of action or anticompetitive conduct.

In this interlocutory appeal Microsoft Corporation ("Microsoft") appeals the judgment of the trial court that indirect purchasers of Microsoft software, purchasers who bought a computer with the software installed or purchased the software from a dealer, have a cause of action against Microsoft pursuant to the Tennessee Trade Practice Act ("TTPA") and the Tennessee Consumer Protection Act ("TCPA"). Plaintiffs appeal the decision of the trial court dismissing the claims of the direct purchasers, those who bought the software directly from Microsoft.

This appeal raises difficult and complex issues of state law, and its interrelationship to federal law, that have been unaddressed in depth by the courts of this state in almost a century. With the aid of informative and well drafted briefs by the parties, we have given thorough consideration to those issues.

I. Background

Plaintiffs filed suit seeking damages, injunctive relief, and equitable remedies under the TTPA, Tenn.Code Ann. §§ 47-25-101 to -2704, and the TCPA, Tenn.Code Ann. §§ 47-18-101 to -1808. The Plaintiffs are a class [FN1] comprised of users of personal computers who bought Microsoft software, either separately or loaded in a computer. Plaintiffs alleged that Microsoft, the leading supplier of operating systems software for personal computers, engaged in conduct that eliminated or retarded the development of new software products that could support or become alternative platforms to Microsoft's operating systems. The Plaintiffs also contended that the price that they paid for their software was higher than it would have been in a competitive market. They emphasized the "massive" involvement of Microsoft in the Tennessee economy, and contended that Microsoft's conduct was within the scope of the TTPA and the TCPA.

> FN1. The class had not been certified. After appeal was granted herein, but prior to oral argument the trial court stayed this case for reasons unrelated to this appeal by order of October 23, 2000. The stay was lifted by order entered September 11, 2002.

***2** The trial court dismissed the claims of the direct purchasers and allowed the claims of the indirect purchasers. In its order, the court considered the history of the TTPA and Tennessee appellate courts' interpretation of the Act and found state law to "start where federal law stops." Further, the trial court held "that the TTPA is to cover 'all commerce not covered by the federal statute' and that the intention of the legislature was to ensure that there was no void where neither federal nor state law governs." Noting that indirect purchasers lacked standing to enforce federal antitrust law and that state antitrust laws could be applied to indirect purchasers, the trial court held that the indirect purchasers herein had a cause of action pursuant to state law. The court dismissed the claims of the direct purchasers.

The issue before us is not whether Microsoft has engaged in conduct violative of either state or federal antitrust law; rather it is whether Plaintiffs have stated a cause of action against Microsoft under Tennessee law. The issues presented involve the scope of Tennessee statutes: (1) their applicability to parties who did not purchase directly from Microsoft; (2) their applicability to business activities that involve interstate commerce; and (3) their applicability to the conduct complained of.

The decision appealed is a partial grant and partial denial of a Tenn. R. Civ. P. 12.02(6) motion. Such a motion is designed to test the sufficiency of the complaint, and dismissal is warranted only when no set of facts would entitle the plaintiffs to relief. *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn.2002). When reviewing the decision on such a motion, this court must take all the well-plead material factual allegations as true, construe the complaint liberally in favor of the plaintiffs, and give the plaintiffs the benefit of all reasonable inferences. *Id.; Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn.1997); *Forman, Inc. v. Nat'l Council on Comp. Ins., Inc.*, 13 S.W.3d 365, 366 (Tenn.Ct.App.1999).

In their complaint, Plaintiffs alleged specific instances of anticompetitive conduct. More succinctly stated, their allegations are:

> Microsoft possesses a dominant, persistent, and increasing share of the world-wide and Tennessee market for Intel-compatible PC operating systems. Because Microsoft's market share is so dominant, it prevents Intel-compatible PC operating systems other than Windows from attracting significant consumer demand. Plaintiffs allege that Microsoft engaged in conduct which eliminated or retarded the development of new software products that could support, or themselves become, alternative platforms to Microsoft's operating systems. Consequently, Plaintiffs and Class members have paid higher prices for Intel- compatible PC operating systems than they would have paid in a competitive market.

Plaintiffs brought this action pursuant to state antitrust law, embodied in the TTPA, which provides, in pertinent part:

> ***3** All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the

> importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

Tenn.Code Ann. § 47-25-101.

> Any arrangements, contracts, and agreements that may be made by any corporation or person, or by and between its agents and subagents, to sell and market its products and articles, manufactured in this state, or imported into this state, to any producer or consumer at prices reduced below the cost of production or importation into this state, including the cost of marketing, and a reasonable and just marginal profit, to cover wages or management, and necessary incidentals, as is observed in the usual course of general business, and the continuance of such practice under such contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or any other arrangements, contracts, or agreements, by and between its agents and subagents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purposes are declared to be against public policy, unlawful, and void.

Tenn.Code Ann. § 47-25-102.

The TTPA provides a number of sanctions for violators, including criminal sanctions and revocation of the right to do business in the state. Tenn.Code Ann. §§ 47-25-103 & -104. While providing for enforcement by the Attorney General, it also provides a remedy to those injured by a violation:

> Any person who is injured or damaged by such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

Tenn.Code Ann. § 47-25-106.

Issues of statutory construction are questions of law reviewed by the appellate courts *de novo* with no presumption of correctness accorded to the findings of the trial court. *Bryant v. Genco Stamping Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn.2000); *Perry v. Sentry Ins. Co.*, 938 S.W.2d 404, 406 (Tenn.1996). In our review, we must apply well-settled principles. The role of the courts in construing statutes is to ascertain and give effect to the legislative purpose and intent without unduly restricting or expanding a statute's coverage beyond its intended scope. *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn.2001); *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn.2000). We attempt to ascertain that purpose or intent from the natural and ordinary meaning of the language used in the statute, without a forced or subtle interpretation that would limit or extend the statute's application. *Id.* We must presume the legislature meant what it said, and if the words plainly mean one thing, they cannot be given another meaning by use of judicial interpretation. *Gleaves v. Checker Cab. Transit Corp.*, 15 S.W.3d 799, 803 (Tenn.2000); *BellSouth Telecomm., Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn.Ct.App.1997).

*4 In the absence of ambiguity in the statute itself, the purpose and intent of the legislature are found in the language used. *Davis v. Reagan*, 951 S.W.2d 766, 768 (Tenn.1997). When the legislative purpose has been expressed in plain, clear and unambiguous language, courts look to that language and give effect to the statute according to the plaint meaning of its terms. *Limbaugh*, 59 S.W.3d at 83; *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 24 (Tenn.2000); *Lavin v. Jordan*, 16 S.W.3d 362, 365 (Tenn.2000).

II. No Direct Purchasers

The same lawsuit has been brought in a number of other states under each state's laws. The reason that state laws have been used rather than federal antitrust laws is because indirect purchasers cannot bring a cause of action for overcharge against an antitrust violator under the federal antitrust statutes. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). Based upon the language of the Clayton Act, the Court held, "the overcharged direct purchaser, and not others in the

chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of [§ 4 of the Clayton Act]." 431 U.S. at 729, 97 S.Ct. at 2067. Thus, for plaintiffs who are indirect purchasers, state law offers the only recourse, although many states follow the federal rule and do not allow actions by indirect purchasers.

In the case before us, the trial court made a distinction between direct and indirect purchasers based upon its interpretation of the relationship between state and federal antitrust law. The trial court agreed with Plaintiffs' argument that, "If an indirect purchaser is adversely affected by a transaction which impacts interstate commerce but is not covered by federal antitrust law, then the transaction is governed by the TTPA." Accordingly, the court held that "the cause of action alleging a violation of the TTPA is limited to indirect purchasers." The court granted the motion to dismiss "only as to the application of the TTPA to direct purchasers."

Our review of the pleadings indicates there are no direct purchasers involved in this litigation. Plaintiffs brought this action "on behalf of themselves and other persons or entities in the State of Tennessee who purchased Intel- compatible PC operating systems licensed by Microsoft for purposes other than resale or distribution." The individually named plaintiffs alleged they purchased either software, Windows 95 and Windows 98, or computers with Windows operating system software already installed. [FN2] Every allegation by a named plaintiff is that the purchase was made from a retailer, not from Microsoft. The allegations all refer to operating system software "licensed by Microsoft;" nowhere is there any allegation that any Plaintiffs actually bought anything directly from Microsoft.

> FN2. The complaint describes the process by which Microsoft authorizes or licenses original equipment manufacturers ("OEM"s) to copy its software for installation in the OEMs' computers which are then sold as a combined product under a single price.

These allegations indicate there are no direct purchasers among Plaintiffs. In fact, in some of their filings in the trial court, Plaintiffs argue that, as indirect purchasers, they are without a remedy under federal law. In other filings Plaintiffs argue that since Microsoft has stated that virtually all its sales are through middlemen, there is some possibility that there may have been some direct sales to some unknown Tennesseans. However, Plaintiffs have made no such claim themselves. The named plaintiffs cannot rely on unidentified persons who may have suffered an injury to state a claim for relief. *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F.Supp.2d 1365, 1371 (S.D.Fla.2001). Each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim. *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir.1987), *cert denied*, 486 U.S. 1005, 108 S.Ct. 1729, 100 L.Ed.2d 193 (1988) . Plaintiffs' allegations that there might be some direct purchasers in this state do not give the actual plaintiffs a claim as a direct purchaser. *See Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir.2001) (explaining that in evaluating standing, the court must look at "the facts alleged in the complaint" and "may not 'speculate concerning the existence of standing or 'piece together support for the plaintiff' ") (quoting *Cone Corp. v. Fla. Dep't of Transp.*, 921 F.2d 1190, 1210 (11th Cir.1991)); *USA v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir.1992) (holding that in order to have standing, plaintiffs must demonstrate more than "purely conclusory allegations" and the pleadings "must be something more than an ingenious academic exercise in the conceivable").

*5 The complaint also makes allegations regarding Microsoft's end user licence agreements, by which end users are granted a right to use the software for specified purposes. The end user license agreement is consummated when the end user installs or begins to use the software. Other than references to the end user licensing agreement, none of the plaintiffs alleges he or she entered into any transactions with Microsoft. While the Plaintiffs principally rely on the end user license agreements in support of other arguments, their filings can be read to rely on those agreements as establishing a relationship between the end user and Microsoft that makes them direct purchasers. [FN3]

FN3. Plaintiffs state that "depending on what discovery may develop further about the nature of the end user license agreements" a buyer-seller relationship "may be" fleshed out.

Indirect purchasers in similar suits under other state statutes have attempted to use the end user license agreement to establish an exception to the indirect purchaser preclusion from claims for damages or to demonstrate that the indirect purchasers are really direct purchasers. This argument has been uniformly rejected. *See, e.g., Pomerantz v. Microsoft Corp.,* 50 P.3d 929, 934-35 (Colo.Ct.App.2002) (holding that the end user license agreement has "no bearing on whether the consumer is a direct purchaser...."); *Davidson v. Microsoft Corp.,* 143 Md.App. 43, 792 A.2d 336, 342 (Md.Ct.Spec.App.2002) (affirming the trial court's dismissal of the consumers' claim where consumers were not direct purchasers despite arguing that end user license agreements made them direct purchasers); *Minuteman, LLC & Assoc. v. Microsoft Corp.,* 147 N.H. 634, 795 A.2d 833, 840-41 (N.H.2002); *Major v. Microsoft Corp.,* 60 P.3d 511, 515 (Okla.Ct.App.2002); *Siena v. Microsoft Corp.,* 796 A.2d 461, 465 (R.I.2002) (stating "the enormous number of potential litigants created by adopting such a warranty or end user license exception to *Illinois Brick Co.* is, in itself, instructive ... [and] these incidental agreements do not exempt plaintiffs' claims from the purview of *Illinois Brick Co.*"). We agree with the reasoning of these courts that the end user licensing agreement, a method used to protect copyrights, does not transform indirect purchasers into direct purchasers.

Although the named Plaintiffs never actually plead status as direct purchasers, they nonetheless appeal the trial court's dismissal of claims by direct purchasers. If we could conclude that any direct purchasers were involved in this lawsuit, we would be inclined to agree with Plaintiffs that the TTPA provides a cause of action for direct purchasers by its own terms. [FN4] Such a cause of action is viable for either direct or indirect purchasers, however, only if subject matter jurisdiction exists or, stated differently, if the TTPA applies.

FN4. Because the plaintiffs have not alleged that they are direct purchasers of Microsoft products, we affirm the trial court's dismissal on behalf of direct purchasers.

III. The Scope of the TTPA

Section 1 of the Sherman Act makes contracts, combinations, and conspiracies "in restraint of trade or commerce among the several states" illegal. 15 U.S.C. § 1. Similarly, Section 2 of the Act prohibits monopolies and conspiracies to monopolize "any part of the trade or commerce among the several States." 15 U.S.C. § 2. Consequently, there is an interstate commerce jurisdictional requirement under the Act. *Summit Health, Ltd. v. Pinhas,* 500 U.S. 322, 11 S.Ct. 1842 (1991).

***6** The scope of Congress's authority to legislate under the Commerce Clause, and the "correspondingly broad reach of the Sherman Act," have evolved through judicial holdings. *See United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (tracing the development of the Court's interpretation). In *Lopez,* the Court enumerated three broad categories of activity that Congress may regulate under its commerce power, the one relevant herein being "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *United States v. Morrison,* 529 U.S. 598, 608-09, 120 S.Ct. 1740, 1749, 146 L.Ed.2d 658 (2000) (quoting *Lopez,* 514 U.S. at 558-59, 115 S.Ct. at 1624) (citing *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893 (1937)).

Federal courts have often been called upon to determine whether activity is sufficiently interstate in nature to bring it within Congress's power to regulate interstate commerce. That authority, exercised in this situation through antitrust statutes, extends beyond activities actually "in" or "part of" interstate commerce. Activities that are wholly local in nature, but that substantially affect interstate commerce, are also included in the reach of federal antitrust statutes. *McLain v. Real Estate Bd. of New Orleans,* 444 U.S. 232, 241, 100 S.Ct. 502, 508, 62 L.Ed.2d 441 (1980).

Just as actions under federal antitrust statutes can proceed only if there is a jurisdictional basis in interstate commerce, a plaintiff seeking relief under state antitrust statutes must show that those statutes apply, whether such a showing is required to establish subject matter jurisdiction or simply to state a claim. Microsoft argues that Plaintiffs herein have failed to make the required allegations because the commerce affected by the conduct complained of is predominantly interstate, not intrastate.

It is undisputed that Microsoft is involved in interstate commerce. Microsoft is the leading supplier of operating systems for personal computers and transacts business throughout the United States and in most countries of the world. Plaintiffs accuse Microsoft of unlawful monopolization of the worldwide licensing market for all Intel-compatible operating systems software and allege this conduct affected prices of software throughout the country and the world. Despite the clear effect Microsoft's business activities have on interstate commerce and the interstate nature of the allegations, Plaintiffs herein have brought this action under state law because they have no federal cause of action. Plaintiffs maintain that Microsoft's anticompetitive conduct, although occurring primarily out of state and affecting interstate commerce, is nonetheless covered by the Tennessee statute because of the substantial adverse effect that conduct had on commerce within the state.

The question presented is not one of federal preemption or federal limitation on the scope of state legislation. As a general rule, federal antitrust law does not preempt state antitrust law. "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law." *Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101-102, 109 S.Ct. 1661, 1666, 104 L.Ed.2d 86 (1989). State antitrust laws "are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *Id.* "Antitrust law ... is a field in which Congress has not sought to replace state with federal law." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 611 (7th Cir.1997). As one court has explained:

***7** Although the U.S. Supreme Court has not explicitly held that state antitrust statutes may apply to matters involving both intrastate and interstate commerce, it has upheld application of state antitrust laws in cases in which those laws clearly affected interstate commerce. *See California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989); *U.S. v. Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944); *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).

Moreover, several lower federal courts have expressly determined that the Commerce Clause of the U.S. Constitution does not necessarily preclude the application of state antitrust laws to interstate commerce. *Shell Oil Co. v. Younger*, 587 F.2d 34 (9th Cir.1978), *cert. denied*, 440 U.S. 947, 99 S.Ct. 1425, 59 L.Ed.2d 635 (1979); *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.*, 438 F.2d 1286 (5th Cir.1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir.1943).

Indeed, several state courts have reasoned that neither federal antitrust legislation nor the Commerce Clause precludes application of state antitrust laws to all interstate commerce. *Younger v. Jensen*, 26 Cal.3d 397, 605 P.2d 813, 161 Cal.Rptr. 905 (1980); *State v. Steriling Theatres Co.*, 64 Wash.2d 761, 394 P.2d 226 (1964); *State v. Southeast Tex. Chap. Of Nat. Elec. Con. Ass'n*, 358 S.W.2d 711 (Tex.Civ.App.1962), *cert. denied*, 372 U.S. 969, 83 S.Ct. 1094, 10 L.Ed.2d 131 (1963); *Peoples Savings Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777 (1960); *State v. Allied Chemical & Dye Corp.*, 9 Wis.2d 290, 101 N.W.2d 133 (1960); *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E.2d 751 (1950); *C. Bennett Bldg. Supplies v. Jenn Air*, 759 S.W.2d 883 (Mo.App.1988); *State v. Coca Cola Bottling Co. of Southwest*, 697 S.W.2d 677 (Tex.App.1985), *appeal dismissed*, 478 U.S. 1029, 107 S.Ct. 9, 92 L.Ed.2d 764 (1986).

Heath Consultants, Inc. v. Precision Instruments, Inc., 247 Neb. 267, 527 N.W.2d 596, 606-07 (Neb.1995). *See also Waste Control Specialists, LLC v. Envirocare of Tex. Inc.*, 199 F.3d 781, 783 (5th Cir.2000); *Blake v. Abbott Labs., Inc.*, 894 F.Supp. 327, 328-29 (E.D.Tenn.1995); *Two Queens, Inc. v. Scoza*, 296 A.D.2d 302, 304, 745 N.Y.S.2d 517 (N.Y.App.Div.2002) (stating that "It is by now well settled that states can enact and enforce, through their courts, legislation which

affects interstate commerce 'when such commerce has significant local consequences' ").

> States now have the power to condemn antitrust violations that occur anywhere in the nation, provided that there are sufficient harmful effects within the state itself. The commerce clause of the United States Constitution is not a substantial barrier to the application of a state's antitrust law to activities occurring outside the state. The Supreme Court has insisted on upholding state antitrust laws under the dormant commerce clause by holding as a general matter that such laws do not interfere with the interstate flow of goods and do not discriminate against interstate commerce. At the same time, the courts refuse to find state antitrust laws preempted by federal antitrust law, unless the conflict is so sharp that compliance with the state law would require violation of the federal law. Even in that instance, the 'state action' exemption from the federal antitrust laws might permit enforcement of the state law.

***8** Herbert Hovenkamp, *State Antitrust in the Federal Scheme,* 58 IND. L.J. 375, 431 (1983).

Thus, the fact that Microsoft engages in interstate commerce does not, under federal law, preclude actions brought under state statutes. Specific conduct can subject a defendant to liability under both federal law and similar state statutes. The District Court in *United States v. Microsoft Corp.*, 87 F.Supp.2d 30, 54 (D.C.2000), found that the facts "proving that Microsoft unlawfully maintained its monopoly power in violation of § 2 of the Sherman Act are sufficient to meet analogous elements of causes of action arising under the laws of each plaintiff state." [FN5] The reviewing court affirmed in part and reversed in part the trial court's findings on violations of the Sherman Act. *United States v.. Microsoft Corp.,* 253 F.3d 34, 46 (D.C.Cir.2001). The Court of Appeals for the D.C. Circuit agreed that Microsoft possessed monopoly power over the relevant market and that it had engaged in anticompetitive conduct to preserve that monopoly in the operating systems software market. The court, however, reversed the district court's finding that Microsoft had unlawfully attempted to extend its monopoly into the internet browser market. [FN6] The court held that its "judgment extends to the District Court's findings with respect to the state law counterparts of the plaintiffs' Sherman Act claims." *Id.* 253 F.3d at 42. Thus, the appellate court affirmed the district court's finding that Microsoft had violated state antitrust laws as well as the Sherman Act with respect to the operating system software. [FN7]

FN5. The District Court cited state statutes from California, Connecticut, District of Columbia, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Ohio, Utah, West Virginia, and Wisconsin.

FN6. The court remanded the issue of whether Microsoft had illegally tied its browser and operating system. On remand, the United States decided not to pursue the tying claim. *See United States v. Microsoft Corp.,* 215 F.Supp.2d 1, 3 n. 2 (D.D.C. July 2, 2002).

FN7. That case was an enforcement action brought by the Department of Justice and a number of state attorneys general. In other cases brought by private parties, defendants have also been subject to liability under both federal and state antitrust laws. *See, e.g., Griffiths v. Blue Cross and Blue Shield of Ala.,* 147 F.Supp.2d 1203, 1214-15 & 1221 (N.D.Ala.2001) (holding that the complaint alleged restraint of trade under Section 1 of the Sherman Act; made sufficient allegations that the primarily intrastate commercial restraint substantially affected interstate commerce to sustain federal jurisdiction; and, based upon the same underlying factual allegations, also made claims under Alabama's antitrust statutes because it claimed an intrastate restraint of trade with effects on both intrastate and interstate commerce); *In re Terazosin Hydrochloride Antitrust Litig.,* 160 F.Supp.2d 1365 (S.D.Fla.2001) (granting partial summary judgment to direct purchaser plaintiffs on Sherman Act claim and considering indirect purchasers' claims under various state antitrust laws); *In re Cardizem CD Antitrust Litig.,* 105 F.Supp.2d 618

(E.D.Mich.2000) (involving direct purchasers bringing claims under the Sherman Act and indirect purchasers bringing claims under antitrust statutes of eight states).

The interstate versus intrastate commerce issue is only raised as a defense where it is arguable that a particular state has limited the scope of its antitrust statute by imposing a greater connection with or impact upon commerce within the state than is the general constitutionally required standard. Apparently, only a few states fall in that category; Tennessee is one. *See, e.g., Cardizem CD Antitrust Litig.*, 105 F.Supp. 618 (E.D.Mich.2000) (involving claims of violation of the antitrust laws of eight states, but raising the interstate versus intrastate commerce issue only as to Wisconsin and Tennessee); *FTC v. Mylan Labs., Inc.*, 62 F.Supp.2d 25, 42 (D.C.1999), *petitions for reconsideration granted in part*, 99 F.Supp. 1 (1999) (involving claims under antitrust laws of thirty-two states with defendants asserting the claims must be dismissed if the state law applies only to intrastate violations, the court finding that only the Louisiana, South Carolina, Tennessee, and Utah statutes required examination under this argument [FN8]); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F.Supp.2d 1365 (S.D.Fla.2001) (involving claims under the antitrust and consumer protection statutes of eighteen states, with challenges as to an intrastate conduct requirement made only to the Tennessee and Wisconsin statutes).

FN8. The court held that state courts in Louisiana were undecided on whether their statute's "restraint of trade or commerce in this state" required that the violation occur in the state, that South Carolina's antitrust act applies only to intrastate commerce but its unfair trade practices act was not so limited, that the Utah statute only applied where the violation occurs in the state, and that the Tennessee statute applied only to violations occurring within the state).

***9** Thus, it is not federal law that determines whether Tennessee has jurisdiction under the TTPA. [FN9] Rather, it is state law that determines what degree of connection with or impact upon commerce within the state must exist.

FN9. Lawsuits essentially identical to the one before us have been brought by indirect purchasers in a number of states, and none has been dismissed on the basis that federal law requires that the suit be brought under the Sherman Act because of its interstate commerce aspects. That argument has not been made by Microsoft in those cases, and it does not make that argument herein. Both parties herein agreed that to the extent the trial court's decision was based upon the exclusivity of federal and state antitrust statutes, that decision was in error.

A. What Tennessee Courts Have Said About the Tennessee Standard

Although federal courts and courts in other states have attempted to determine the reach of Tennessee's antitrust statute, our state courts have spoken rarely on the topic. We begin with the seminal case, *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S.W. 705 (1907), the Tennessee Supreme Court's last statement on the issue. [FN10]

FN10. The Court has considered antitrust issues, such as the requirement of an actual antitrust injury, in cases construing other statutes. *See GHEM, Inc.*, 850 S.W.2d 447 (Tenn.1993) (construing the Petroleum Trade Practices Act); *Walker v. Bruno's, Inc.*, 650 S.W.2d 357 (Tenn.1983) (holding that the Tennessee Unfair Milk Sales Act did not conflict with the Sherman Act). *See also State ex rel. Attorney Gen. v. Burley Tobacco Growers' Co-Operative Ass'n*, 2 Tenn.App. 674 (Tenn.Ct.App.1927) (holding, in a suit to prohibit association from transacting business in this state for violation of antitrust statutes, that a statute allowing co-operative marketing legalized practices that might have previously been illegal).

Standard Oil involved a constitutional challenge to the TTPA. [FN11] In that case, the Standard Oil Company and its employee, Mr. Holt, were indicted for violating state antitrust laws by making an unlawful agreement for the purpose of lessening competition in the sale of coal oil. The company and its agents induced customers in Gallatin to cancel orders they had placed with a competitor by offering the customers quantities of free oil. Once it again became the sole supplier of coal oil in the area, the company raised its prices. After being found guilty by a jury, Standard Oil and Mr. Holt appealed and therein assailed the constitutionality of the statue, arguing that it was invalid because it was an attempt at regulation of interstate commerce. The Tennessee Supreme Court disagreed.

> FN11. The language of the act defining the prohibited conduct has not changed since the Court interpreted it in *Standard Oil.*

It is important to recognize the basis for the constitutional challenge so that the Court's holdings can be placed in proper context. Standard Oil argued that to the extent the statute applied to transactions relating to the importation of articles of commerce from other states, [FN12] it impinged upon Congress's exclusive power to regulate interstate commerce. Based upon its determination of the legislative intent behind the statute, the Court held that the statute did not apply to interstate commerce "when properly construed," and stated, "the sole object and purpose of the enactment of it was to correct and prohibit abuses of trade within the state." 117 Tenn. at 635, 100 S.W. at 709.

> FN12. In pertinent part, the statute made unlawful arrangements lessening competition "in the importation or sale of articles imported into this state." Tenn.Code Ann. § 47-25-101.

Applying fundamental rules of statutory construction, including an examination of the history of the time when the statute was passed, the Court concluded:

> The Legislature was cognizant, we must presume, that it had no power to enact laws regulating interstate commerce, and did not intend to enact unconstitutional law, in whole or in part. There was already then in force an act of Congress, the Sherman Antitrust Act, enacted in 1890, fully covering that subject, the provisions of which were much broader and more effective than those of this act, and could be enforced to their fullest extent by the stronger and more vigorous government. There was neither the power nor the necessity for enacting any legislation relative to interstate commerce. **The wrongs to trade which were intended to be corrected and punished were those being perpetrated against commerce within the state,** which Congress could not reach, and for which there was then no efficient remedy.

***10** *Id.* 117 Tenn. at 639-40, 100 S.W. at 710 (emphasis added).

The Court found that the convictions were based upon charges and proof of agreements to lessen competition in the sale of coal oil that had already been imported into the state prior to the agreement . [FN13] 117 Tenn. at 646- 47, 100 S.W. at 712. This finding was consistent with the Court's interpretation of the word "importation" as used in the statute, to include articles "which had been imported from other states and countries, commingled with the common mass of property in this state, and no longer articles of interstate commerce." *Id.* at 117 Tenn. at 642-43, 100 S.W. at 711.

> FN13. The appellants had argued that the statute impinged on interstate commerce because it was applied, in their case, to an arrangement relating to property to be thereafter imported into the state. The Court made clear, however, that there was no averment that the agreement was made to lessen competition in the sale of coal oil intended to be imported by Standard Oil's competitor. 117 Tenn. at 642-43, 100 S.W. at 711.

Relying on precedent holding that commerce in "such" imported articles may be regulated by state legislation, the Court determined that the legislature's intent was to protect commerce in articles already imported into the state because that

commerce would not otherwise be protected if not expressly mentioned in the statute; [FN14] it needed the same protection as commerce in domestic products due to the investment of Tennessee citizens in imported property; and because:

> FN14. This conclusion was based upon the narrow interpretation of Congress's Commerce Clause power that prevailed at the time.

> [t]he Legislature clearly intended to prohibit trusts, combinations, and agreements affecting all commerce not covered by the federal statute, and upon which it had a right to legislate. **It did not intend to stop short of its power or to exceed it.**

Standard Oil, 117 Tenn. at 643, 100 S.W. at 711 (emphasis added).

The Court's holdings were shaped in the context of two expressed principles. One, that it is the courts' duty to construe a statute so as to avoid conflict with the United States Constitution, if such construction can be accomplished without disregard of the evident intent of the legislature. 117 Tenn. at 642, 100 S.W. at 710. Second, that even though the legislature may include overly broad terms in a statute, it is the duty of the courts to limit application of the statute to those situations that were within the intent of the legislature. *Id.* 117 Tenn. at 643, 100 S.W. at 711.

We interpret *Standard Oil* as holding, whether because of Constitutional limitations or because of imputed legislative intent consistent with those limitations, that the state antitrust statute did not infringe on Congress's exclusive power to regulate interstate commerce. All of the Court's findings in that case were made in the context of the constitutionally allowed scope of authority of state legislatures in the areas of antitrust law and interstate commerce and the court's duty to interpret the statute so as to avoid constitutional invalidity.

Shortly after the *Standard Oil* criminal case, the Attorney General sought to enjoin the out-of-state corporation from doing business in the state based upon the same conduct that resulted in the criminal convictions. On appeal, Standard Oil raised the same interstate commerce infringement challenge to the statute, and the Tennessee Supreme Court merely recited and readopted its holdings in *Standard Oil. State ex rel. Cates v. Standard Oil Co. of Ky.,* 120 Tenn. 86, 110 S.W. 565 (1908), *aff'd by Standard Oil of Ky. v. State of Tenn., ex rel. Cates,* 217 U.S. 413, 30 S.Ct. 543, 54 L.Ed. 817 (1910). The case eventually went to the United States Supreme Court, which upheld the ouster of the foreign corporation and stated:

> ***11** The present statute ... does not regulate business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the states as well as with the rest does not invalidate it.

217 U.S. at 422, 30 S.Ct. at 544.

This statement provides another explanation for the Tennessee Supreme Court's determination that the Act did not unconstitutionally attempt to regulate interstate commerce that is consistent with that court's earlier statement in *State ex rel. Astor,* 104 Tenn. 715, 740-41, 59 S.W. 1033, 1039 (1900), that the act's inclusion of imported goods was not an interference with interstate commerce or a regulation of such commerce. It also demonstrates that even at that time there was no clear demarcation between interstate and intrastate commerce and no complete exclusivity. The Tennessee Supreme Court had said the same thing in *Standard Oil,* when it recognized that the TTPA could reach conduct "where interstate commerce is incidentally affected." 117 Tenn. at 647, 100 S.W. 712.

The Tennessee Court of Appeals has discussed the interpretation of the TTPA in only a few cases. The first is *Lynch Display Corp. v. Nat'l Souvenir Ctr.,* 640 S.W.2d 837 (Tenn.Ct.App.1982). In that case, Lynch, a Maryland corporation manufacturing and leasing wax figures for museums, agreed to manufacture and lease to Historical Reviews, Inc. ("HRI"), [FN15] a Tennessee Corporation that operated a wax museum in Gatlinburg, 90 wax figures to be displayed in its museum. The lease agreement included a provision that required HRI to enter into a franchising agreement with National Historical Museum, Inc. ("NHM"), a District of Columbia corporation.

> FN15. HRI was a wholly owned subsidiary of National Souvenir Center, Inc., a District of Columbia corporation that was also a party to this suit.

When HRI stopped making payments under the franchise agreement, Lynch brought suit. HRI counterclaimed and defended on the basis that the original lease and franchising agreement were forced on HRI because of the monopoly position of Lynch and, consequently, the agreements were void under the Tennessee antitrust statute. This court determined that the Tennessee antitrust statute could not be used as the basis for either the counterclaim or the defense because that statute was simply not applicable. It agreed with the trial court's conclusion that the activities of the parties "were acts exclusively in interstate commerce and therefore not within the purview of the Tennessee Antitrust Act." 640 S.W.2d at 838. The court held:

> The Tennessee antitrust law applies to transactions which are *predominantly* intrastate in character. The transaction does not have to be *exclusively* intrastate to be affected. The old constitutional doctrine of mutual exclusivity between state and federal laws affecting commerce has long been rejected. [FN16] The Tennessee Supreme Court has recognized this fact in the important opinion *Standard Oil Co. v. State.* ...

> FN16. In support of this statement, the court cited *S.C. Hwy. Dep't v. Barnwell Bros.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938) and *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 64 S.Ct. 967, 88 L.Ed. 1227 (1944).

*12 640 S.W.2d at 840. Applying the standard of "predominantly intrastate," the court reached the conclusion that the subject of the dispute, the lease and franchise agreement between instate and out-of-state corporations, was "predominantly interstate in character [and] only incidentally affects intrastate commerce." *Id.*

> [T]he predominant character of these agreements is interstate commerce. The goods, services, and payment for them is flowing between parties in different states. Appellants argue in their briefs that the wax museum has been established in Gatlinburg for 17 years and regularly sells tickets to customers in exchange for admission and that this fact establishes significant intrastate commerce. Although this is unquestionably intrastate commerce, it is of a nature incidental to the predominant agreements in this dispute. Hence, the Tennessee antitrust statute does not apply.

Lynch Display Corp., 640 S.W.2d at 840-41.

This court again addressed the application of the TTPA in *Blake v. Abbott Labs., Inc.*, No. 03A01-9509-CV-00307, 1996 WL 134947 (Tenn.Ct.App. Mar.27, 1996) (no Tenn. R.App. P. 11 application filed). The plaintiffs in *Blake* alleged that the defendants, Abbott Laboratories, an out-of-state company distributing nationwide, grossly overcharged Tennessee consumers who purchased infant formula in the state. This court found that the only sufficiently plead facts were that the defendants, along with others, conspired to fix prices and did fix prices of formula.

In the portion of the opinion relevant to this issue, the court in *Blake* reiterated the "predominantly intrastate" standard established in *Lynch*, but proceeded to apply the test to the effect of the allegedly illegal conduct on commerce. The court determined that there were not sufficient facts alleged to make a finding "that the transactions complained of predominantly affect interstate commerce as opposed to intrastate commerce" and, consequently, dismissal under Tenn. R. Civ. P. 12 was inappropriate. 1996 WL 134947, at *5. However, "if it is later determined by some manner cognizable under Tennessee law that the actions complained of by the plaintiff predominantly affect interstate commerce, then the defendants must prevail on this issue." *Id.*

Finally, this court was called upon to interpret Tennessee's antitrust statutes in *Forman v. Nat'l Council on Comp. Ins., Inc.*, 13 S.W.3d 365 (Tenn.Ct.App.1999), but only on the question of whether workers' compensation insurance, an intangible contract right or service, was an article or product subject to those statutes. This court found that the antitrust statutes did not apply to insurance and declined to adopt the argument that *Standard Oil* indicated that the state statute should be interpreted expansively to encompass claims not precluded by the federal antitrust statutes, at least

with regard to the definition of articles or goods.

B. What Other Courts Have Said About the Tennessee Standard

***13** A number of courts not part of the Tennessee court system have examined the scope of Tennessee's antitrust statute using the scant state authority discussed above. [FN17] While those decisions are not binding on the courts of this state, [FN18] they are informative and demonstrate the differing and even inconsistent conclusions that have been reached.

> FN17. Some of those courts have relied upon an additional opinion this court is precluded from addressing because the Tennessee Supreme Court concurred in results only when it denied permission to appeal. Pursuant to Tenn. R. Sup.Ct. 4(F), an intermediate court opinion so designated may not be cited by any judge or by any litigant. Because courts outside our state court system have cited the opinion, however, it is prudent for us to provide the name and citation: *Dzik & Dzik, P.C. v. Vision Serv. Plan,* No. 836, 1989 WL 3082 (Tenn.Ct.App. Jan.20, 1989) (permission to appeal denied, concurring in results only, Aug. 7, 1989).

> FN18. This court has described the effect of the interpretation of state law by federal courts as follows: Federal courts look to the law of the state as declared by its highest court when they decide questions of state law. In the absence of an authoritative pronouncement by the state's highest court, the federal courts may either certify the state law question to the state's highest court for an interpretation, Tenn. S.Ct. 23; *Arizonans for Official English v. Arizona,* 520 U.S. 43, 76-78, 117 S.Ct. 1055, 1073-74, 137 L.Ed.2d 170 (1977), or ascertain and apply the state law as they understand it from available sources. *United States v. Anderson County,* 761 F.2d 1169, 1173 (6th Cir.1953). When a federal court undertakes to decide a state law question in the absence of authoritative state precedent, the state courts are not bound to follow the federal court's decision.
> *Townes v. Sunbeam Oster Co., Inc.,* 50 S.W.3d 446, 452 (Tenn.Ct.App.2001).

In a reported decision by a federal court in Tennessee, *Valley Prods. Co., Inc. v. Landmark,* 877 F.Supp. 1087 (W.D.Tenn.1994), the court, relying on *Lynch,* held that the Tennessee antitrust statute applies to transactions that are predominantly intrastate in character. "Although the dispute need not be exclusively intrastate to fall within the statute, it must more than incidentally affect intrastate commerce." *Id.* 877 F.Supp. at 1095. The court held that the standard was not met because "[t]he matter before the court clearly involves significant interstate commerce and activity and only minimally affects intrastate commerce. HFS franchisees are located in every state in the country and the sale of guest amenities necessarily implicates many geographic regions." *Id.* [FN19]

> FN19. In *Duke v. Browning-Ferris Indus. of Tenn., Inc.,* No. 96- 2859-TUA, 1996 WL 33415134 (W.D.Tenn. Oct.22, 1996), the court considered an antitrust claim under the Tennessee statute that was essentially the same as one brought by the plaintiff in another case under federal law. The court viewed its task as determining whether a cause of action had been alleged under the *Sherman Act* or under state law, stating, "The main distinction between claims under the Tennessee and the federal statutes is that the Sherman Act prohibits monopolization in interstate commerce, while the Tennessee statute only applies if the action is predominantly intrastate." 1996 U.S. Dist. LEXIS at *7-*8. In a third case, *Blake v. Abbott Labs., Inc.,* 894 F.Supp. 327 (E.D.Tenn.1995), the court did not address the merits of plaintiffs' claim under state law, but commented that the Tennessee Supreme Court had narrowly construed Tennessee antitrust law in *Standard Oil.* 894 F.Supp. at 330.

Federal courts outside this state have also been called upon to apply the TTPA. In *FTC v. Mylan Labs., Inc.*, 62 F.Supp.2d 25 (D.C.1999) the United States District Court for the District of Columbia considered claims brought by thirty-two states under the Sherman Act as well as under each individual state's antitrust laws. The initial lawsuit brought by the FTC alleged the defendants were engaging in unfair methods of competition in or affecting commerce. The states joined in adopting these allegations, added another defendant, and alleged an illegal price-fixing agreement.

The defendants moved to dismiss the state law claims on various grounds, one being that the state law challenges to the interstate conduct alleged must be dismissed if the state law applies only to intrastate violations of the law. With regard to Tennessee, the court dismissed all claims brought under the TTPA and the TCPA "because both statutes apply only to violations occurring in intrastate commerce," relying on *Standard Oil. Mylan Labs., Inc.*, 62 F.Supp.2d at 51. *See also FTC v. Mylan Labs., Inc.*, 99 F.Supp.2d 1, 4 (D.C.Cir.1999) (reaffirming on motion to reconsider its decision to dismiss the Tennessee claims because the conduct complained of was predominantly interstate).

The same court in a later case saw fit to "expound upon its rationale" for ruling in *Mylan Labs* that the national conspiracy affecting thirty-two states was outside the ambit of Tennessee's antitrust laws. *In re Vitamins Antitrust Litig.*, 2001 WL 849928 (D.D.C. Apr.11, 2001). The court emphasized that the Tennessee Supreme Court had narrowed the importation language of the statute and found significant the *Standard Oil* court's specific holding that the oil that was the subject of the anticompetitive arrangement was not an article of interstate commerce when the agreement was made; it had already come to rest in Tennessee. Stating, "[a]nd therein lies the critical distinction upon which *Mylan* and the instant action lie," the court reiterated its holding in *Mylan* that when the challenged conduct occurs before the products arrive in Tennessee, the conduct is considered interstate and not subject to the TTPA or the TCPA. *In re Vitamins Antitrust Litig.*, 2001 WL 849928, at * 4. The court also relied upon *Lynch* and *Blake* for the predominantly intrastate test, and its application to the facts therein. Distinguishing the case before it from *Blake*, the court had no trouble finding that "although the alleged conduct may have a demonstrable effect in Tennessee, this effect is clearly incidental in comparison to the interstate character of the alleged conspiracy." *Id.* at *5.

***14** A similar conclusion was reached in *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F.Supp.2d 1365 (S.D.Fla.2001), wherein classes of indirect and direct purchasers of certain drugs filed complaints alleging violations of federal and various state antitrust and consumer protection laws. The indirect purchasers' claims under federal law were dismissed. The court also dismissed those state law claims where no named plaintiff had purchased a particular drug in that state. The court then proceeded to examine the remaining claims on a state by state basis and held that the TTPA did not reach "so far as to prohibit the nationwide conspiracy alleged in the end payors' complaint." 160 F.Supp.2d at 1376-77. The court reached this conclusion based in part on its reading of *Standard Oil*, which it interpreted as holding that the statute applied to commerce within Tennessee, not contracts "in relation to the importation of articles." 160 F.Supp.2d at 1377 (quoting *Standard Oil*, 117 Tenn. at 643, 100 S.W. at 711).

The court also held that *Standard Oil* had been refined by the courts to hold that the Act applies to transactions which are predominantly intrastate in character and found that the complaint did not meet that standard. Noting that, "conspicuously absent from the complaint are any allegations that the defendants forged alliances in Tennessee, stored terazosin hydrochloride drugs therein, or sold them within the state at the time," 160 F.Supp.2d at 1377, the court concluded, "No reasonable observer confronted with these allegations would infer that the defendants' conspiracy was 'predominantly intrastate' in character." 160 F.Supp.2d at 1378.

A different result, emanating from a different interpretation, was reached in *In re Cardizem CD Antitrust Litig.*, 105 F.Supp.2d 618 (E.D.Mich.2000). That multidistrict litigation involved class actions under federal law and under various state laws and alleged that the defendants committed anticompetitive practices with regard to the sale of heart medication.

Relying on previously discussed holdings, the

defendants argued that the claims for violation of the TTPA and the TCPA must be dismissed because these statutes apply only to transactions that are wholly or predominantly intrastate in character and plaintiffs alleged anticompetitive activity and restraints of trade occurring in several jurisdictions. The court, however, found that this argument interpreted the statutes too narrowly and agreed with the plaintiffs' position that the statutes

> allow Tennessee to regulate anticompetitive conduct occurring outside the state but having more than incidental effect on Tennessee's intrastate commerce; i.e., situations like that alleged here where anticompetitive conduct may have occurred outside the state but results in a prescription drug product intentionally coming to rest within Tennessee and causing injury to Tennessee citizens who have purchased the product in Tennessee at artificially inflated prices as a result of Defendants' anticompetitive conduct.

***15** *In re Cardizem CD Antitrust Litig.*, 105 F.Supp.2d at 667.

The court based its conclusion on its interpretation of *Standard Oil* and the more recent opinion in *Forman, supra,* which the court described as "observing that 'it is clear that Tennessee Code Annotated section 47-25- 101, in express terms, applies to articles of foreign and domestic origin.' " 105 F.Supp.2d at 667.

The *Cardizem* court then found that courts have subsequently held that to state a claim under Tennessee's antitrust statute, "the dispute need not be exclusively intrastate" but "it must more than incidentally affect intrastate commerce," citing *Valley Products.* 105 F.Supp.2d at 667. The court held that the antitrust statutes were not limited to anticompetitive conspiracies that are "hatched and implemented solely or predominantly" in Tennessee and to the extent the decisions in *Lynch, Blake, Dzik,* and *Mylan* held otherwise, those decisions were "wrongly decided ." 105 F.Supp. at 667. The court went on to predict that the Tennessee Supreme Court, if presented with the issue would establish a test of whether the alleged facts show that an illegal combination or agreement more than incidentally affects Tennessee's intrastate commerce. *Id.* at 667-68.

IV. The Tennessee Intrastate Commerce Requirement

As the above discussion demonstrates, various courts have interpreted the scarce Tennessee authority to espouse different tests for whether Tennessee's antitrust statute applies. Some have focused on the defendant's conduct, some have focused on the transactions involved, and some have looked to the nature of the dispute. Many have focused on, or at least included in the analysis, the effects on commerce.

A. Test Based on Transaction or Illegal Conduct

Our review of *Lynch* confirms Plaintiffs' assertions that no background, source, authority, or explanation is given for the court's statement that, "Tennessee antitrust law applies to transactions which are predominantly intrastate in character." As the quoted statement makes clear, the standard announced in *Lynch* focused on the transaction giving rise to the dispute, or the "character" of the agreements between the parties. However, the court also stated that the intrastate commerce activities of plaintiff were only incidental to the parties' transactions and that the agreements only incidentally affected intrastate commerce.

The *Lynch* court's focus on the character of the transaction is understandable in light of the issue in that case: the enforceability of contracts between the parties to the lawsuit. Thus, the nature or character of the transaction could be analyzed. *See also Valley Products,* 877 F.Supp. at 1094-95 (involving a specific relationship between the parties). Attempting to apply a transaction-based standard to the case before us illustrates the difficulty of such a standard. Herein, there were no direct transactions between Plaintiffs, indirect purchasers, and the defendant. The complaint alleges intrastate and interstate purchases by Plaintiffs from third parties and also alleges interstate transactions between Microsoft, an out-of-state corporation, and third parties, at least some of which are also out-of-state corporations. *Lynch* provides no guidance as to which of these transactions is subject to the "predominantly intrastate" test. [FN20]

FN20. Some courts have found a legislature's grant of remedy to indirect

purchasers significant in determining the scope of a state's antitrust statute. *See, e.g.., Emergency One v. Waterous Co., Inc.,* 23 F.Supp.2d 959, 964 (E.D.Wis.1998) (holding that the best indication of an intent to hold interstate actors accountable may be the inclusion of a remedy for indirect purchasers, and stating "the prototypical indirect purchasers action would vindicate far-flung consumers for the indirect costs of price-fixing conducted on a national scale").

***16** We find no language in the TTPA itself to evidence an intent that it cover only intrastate transactions. Similarly, we find no expression of intent that only illegal conduct occurring in this state subjects the defendant to civil causes of action. [FN21] While the Tennessee legislature could have placed such limitations on the scope of the TTPA, *see, e.g., Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.,* 746 So.2d 966, 989-90 (Ala.1999) (holding that Alabama's antitrust statute regulates only "monopolistic activities that occur 'within this state'--within the geographical boundaries of this state"); and *Mylan Labs.,* 62 F.Supp.2d at 47, 51, and 52 (discussing the requirement in several states that the illegal conduct occur in the state), we simply find no indication of such intent in the statute itself.

FN21. The federal court's statement in *In re Terazosin Hydrochloride Antitrust Litig.* that the phrase "transactions," as used in the plaintiffs' pleadings and, presumably, as used in *Lynch,* must refer to the actions of the defendants because Tenn.Code Ann. § 47-25-102 prohibited "arrangements to restrain competition," 160 F.Supp. at 1377 n. 9, implies that the test is related to the alleged illegal conduct. We disagree with that conclusion, however, because the *Lynch* court's analysis of the transactions between the parties, i.e. their contractual relationship, demonstrates that the *Lynch* standard was based upon the transactions between the parties giving rise to the dispute, not to the location of the allegedly anticompetitive acts.

The TTPA applies, by its terms, to arrangements lessening competition "in the sale of articles imported into this state" or affecting the "price or the cost to the producer or the consumer of any such product or article." Consequently, the legislature clearly intended that the Act apply to anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers in Tennessee even though those goods may have arrived in Tennessee through interstate commerce. Other than the reference to articles imported "into this state," the statute includes no "in this state" language. Thus, the statute itself does not place a geographic limitation on where the illegal conduct must occur or on the nature of the transactions involved. Because the purchase by consumers in this state of articles imported from out of state will generally involve at least one transaction between instate and out-of-state parties, we must presume the legislature intended that such transactions be included in the statute's reach, contrary to the *Lynch* court's analysis.

We also find no judicial interpretation prior to *Lynch* establishing such limitation To the contrary, in *Bailey v. Ass'n of Master Plumbers,* 103 Tenn. 99, 52 S.W. 853 (1899), the Supreme Court of Tennessee found, under common law and under the statute at issue herein, void and unenforceable certain provisions of the bylaws of the Association of Master Plumbers of the City of Memphis. In particular, the court examined a provision that required members to purchase materials and supplies from only specified dealers who had agreed to sell only to members of the association. The court noted that the dealers, by agreeing to and observing this provision, had become parties to the scheme. Several out-of-state dealers had ratified the by-laws as to themselves and refused to sell to non-members. "This action of important dealers was the consummation of a vital part of the complex scheme," resulting in a restraint of trade in a Tennessee community. *Id.* 103 Tenn. at 121, 52 S.W. at 858.

State ex rel. Astor v. Schlitz Brewing Co., 104 Tenn. 715, 59 S.W. 1033 (1900), involved an action by this state's Attorney General to enjoin a foreign corporation from doing business in Tennessee because of alleged violations of this state's antitrust statutes. The complaint alleged that Schlitz Brewing Company, the foreign corporation,

and its agent in Tennessee had entered into an arrangement with a Tennessee corporation and other brewers with the intent and effect of lessening competition in the importation and sale of beer. The defendants attacked the statute as unconstitutional under various provisions of the Tennessee Constitution and the United States Constitution, but the Tennessee Supreme Court found the act constitutional in all particulars. 104 Tenn. at 750-51, 59 S.W. at 1041. The court upheld the provision penalizing a foreign corporation by prohibiting it from doing business in the state. In addition, the court found:

> ***17** The subject of this act, as already stated, is the prohibition and punishment of those transactions which are calculated to lessen competition in trade, or to influence the price of either imported or domestic goods.

State ex rel. Astor, 104 Tenn. at 741-42, 59 S.W. at 1039. *Standard Oil* itself involved an out-of-state corporation that sold coal oil in this state and was convicted for its role in an arrangement to reduce competition in this state. *See also State ex rel Cates v. Standard Oil Co. of Ky.,* 120 Tenn. 86, 110 S.W. 565 (1908), *aff'd by Standard Oil of Ky. v. State of Tenn., ex rel. Cates,* 217 U.S. 413, 30 S.Ct. 543, 54 L.Ed. 817 (1910) (prohibiting the same foreign corporation from doing business in this state because it violated the Act).

Courts in other states have relied upon statutory language in considering the reach of their states' antitrust statutes. For example, in *Heath Consultants, Inc.,* 527 N.W.2d at 606, the Nebraska Supreme Court held that the Nebraska antitrust statute, which prohibited combinations "in restraint of trade or commerce, within this state" applied to extraterritorial conduct when that conduct affected consumers within the state, stating:

> While there is no showing that any of the conduct about which Precision complains occurred within the territorial limits of this state, the record nonetheless inferentially establishes that the tying arrangement affected end users of Heath equipment in Nebraska by denying them the advantage of parts sold in a freely competitive market.

527 N.W.2d at 606. The court concluded this evidenced anticompetitive conduct restraining trade within the state and the statute applied. *Id. See also In re: Microsoft Antitrust Litig.,* No. CV-99-752 & -709, 2001 WL 1711517 (Me.Super.Ct. Mar. 26, 2001) (holding that the Maine antitrust statute applied to illegal conduct occurring outside the state that restrains trade or monopolizes any part of the trade or commerce within the state, because the statute used the phrases "in this State" and "of this State" to modify trade or commerce, not the illegal conduct).

The Wisconsin Supreme Court determined in *State v. Allied Chemical & Dye Corp.,* 9 Wis.2d 290, 101 N.W.2d 133 (Wis.1960), that because the people of that state were entitled to the advantages that flow from free competition, any illegal arrangement restraining trade or affecting prices to those citizens was within the state's police power to prohibit or punish, regardless of the fact that the defendants did not operate a manufacturing, sales, or other facility within the state.

We conclude that Tennessee's antitrust statute is not limited to anticompetitive conduct occurring within the boundaries of the state. We also conclude that it is not limited to transactions between the parties that are predominantly intrastate in character. We also conclude that neither a transaction-based nor a locality-of-illegal-conduct based test is appropriate for determining the scope of the TTPA. Instead, the proper test must relate to the potential effect or impact on commerce within this state of the illegal acts condemned by the statute because such a standard is directly related to the purpose of the Act.

***18** As set out earlier, the court in *Astor* indicated it was the effect on trade or commerce in Tennessee that was the determinative factor in whether the statute applied. That conclusion is reinforced by the court's additional statements that, "The thing condemned and punished by the Act is injury to trade. The thing protected is trade...." *State ex rel. Astor,* 104 Tenn. at 741-42, 59 S.W. at 1039. These comments are consistent with the Supreme Court's statement in *Standard Oil* that the "wrongs to trade which were intended to be corrected and punished were those being perpetrated against commerce within the state,...." 117 Tenn. at 642, 100 S.W. at 710. In addition, we note that the criminal sanctions portion of the statute declares that a violation of either section 101 or 102 is "a conspiracy against trade." Tenn.Code Ann. § 47-25-101 & -102.

B. Test Based on Effect on Commerce Within the

State

Those courts examining Tennessee's statute under an effects on commerce test have espoused the two standards argued by the parties herein: the "predominant effects" standard and the "significant effects" standard.

Federal courts use an effects on commerce test in determining whether federal law is applicable to an antitrust action. For purposes of establishing jurisdiction under the Sherman Act, plaintiffs must only demonstrate a substantial, or not insubstantial, effect on interstate commerce generated by the defendant's normal business activity that is infected by the illegal conduct. *McLain,* 444 U.S. at 242-43, 100 S.Ct. at 509. [FN22] In *Blake,* this court indicated the correct analysis would involve examining whether the alleged illegal actions by defendants predominantly affected interstate or intrastate commerce. 1996 WL 134947, at *5.

> FN22. The Court specifically held that the plaintiffs are not required to make the "more particularized showing" that the anticompetitive conduct caused an effect on interstate commerce. 444 U.S. at 242-43, 100 S.Ct. at 509. The test enunciated is:
> To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved.
> 444 U.S. at 246, 100 S.Ct. at 511. The pleading requirement has been refined, at least in some circuits, to require identification of the relevant aspect of interstate commerce. *Valley Disposal v. Cent. Vt. Solid Waste Mgmt. Dist.,* 31 F.3d 89, 94 (2d Cir.1994).

Applying a similar analysis, the inquiry becomes whether that portion of Microsoft's business infected by the alleged illegal conduct, or whether that illegal conduct itself: (1) predominantly affects intrastate commerce as opposed to interstate commerce, under the "predominant effects" test, or (2) has a substantial effect on commerce within Tennessee, under the "substantial effects" test.

The predominant effects standard requires the court to make a determination of whether the commerce involved or potentially affected by the wrongful conduct is predominantly intrastate or interstate. Courts are not unfamiliar with legal standards requiring them to determine predominance. *See, e.g., Trau-Med of Am., Inc.,* 71 S.W.3d at 702 n. 5 (holding that to sustain an action for intentional inference with business relationships, improper motive must be shown by plaintiff demonstrating that the defendant's predominant purpose was to injure the plaintiff); *City of Chattanooga v. Davis,* 54 S.W.3d 248, 270 n. 22 (Tenn.2001) (requiring a determination of whether the predominant "remedial" purpose of a monetary sanction is ensuring deterrence against wrongdoing); *Williams v. Estate of Williams,* 865 S.W.2d 3, 5 (Tenn.1993) (holding that the expressed predominant purpose of a testator prevails, and subsidiary clauses must be construed so as to bring them into subordination to the predominant purpose); *Hudson v. Town and Country True Value Hardware, Inc.,* 666 S.W.2d 51 (Tenn.1984) (adopting and applying the test for the application of the Uniform Commercial Code as depending on whether the predominant assets to be transferred are goods or services).

***19** "Predominant" is a relative term; whether something is predominant can only be determined in relation to other things; it is greater or superior in influence compared to other factors. *Dillard v. City of Greensboro,* 946 F.Supp. 946, 955-56 (M.D.Ala.1996); *Matthews v. Bliss,* 39 Mass. 48, 53 (1839). Consequently, we agree that "[a]n action cannot be both predominantly interstate in nature and predominantly intrastate in nature; it must be one or the other." *Emergency One,* 23 F.Supp.2d at 967. [FN23]

> FN23. Although Plaintiffs argued that the predominant effects test was extinct, inapplicable, and introduced into Tennessee law without explanation or authority, they also maintained that their claims met the predominant effects test. We disagree. Based upon allegations in the complaint, it is clear that Microsoft's

> allegedly anticompetitive conduct would have had effects on interstate commerce, as well as on that of other states. Confronted with these allegations, we cannot infer that the effects are predominantly intrastate. Plaintiffs have offered no factual allegations that they are. Plaintiffs' conclusory allegations that Microsoft's conduct had significant, substantial, and "predominant" effects on trade and commerce inside the state of Tennessee cannot suffice for the absence of even one factual allegation that the effects in Tennessee are predominant over the effects nationwide.

The *Lynch* decision has been interpreted by some courts as introducing the predominant effects test into Tennessee law. However, the court in *Lynch* actually mentioned the effect on intrastate commerce as only incidental to the interstate nature of the transaction. It is a significant leap to translate "not incidental" to "predominant." Thus, to the extent *Lynch* set a standard based on the effect on commerce within the state, that standard can only be interpreted as requiring something more than an incidental effect. It was in the unreported decision in *Blake* that this court indicated that plaintiffs could only proceed under the TTPA if they could show that the alleged anticompetitive conduct affected predominantly intrastate, as opposed to interstate, commerce.

According to Plaintiffs, *Lynch* and subsequent cases have mechanically applied the "predominant vs. incidental effects" test, with no discussion of the impact of current Commerce Clause analysis on the efficacy of this test for state court jurisdiction. Indeed, at the time *Standard Oil* was decided and into the middle of the twentieth century, a dichotomy or dual sovereignty theory prevailed presuming mutually exclusive jurisdiction for state and federal regulation. [FN24] However, state antitrust laws are now considered supplementary and complementary to federal laws and enforcement of state laws consistent with the purposes of federal legislation. *ARC America,* 490 U.S. at 101-02, 109 S.Ct. at 1661. Plaintiffs' position is supported by judicial analysis of the issue:

> FN24. For a discussion of the "dual sovereignty" theory that predominated in early state antitrust cases, which set forth distinct and mutually exclusive jurisdictional areas for state and federal regulation, *see Abbott Labs. v. Durrett,* 746 So.2d 316 (Ala.1999) and *Archer Daniels Midland Co.,* 746 So.2d at 987-88 .

> Framing the issue as one of predominance thus becomes a way of reintroducing federal preemption of state antitrust law--a result consistently rejected by the Supreme Court. Congress intended the federal antitrust laws to supplement and not displace state regulation.... Further, a standard which results in the mutually exclusive application of state and federal antitrust law is contrary to Congressional intent and Supreme Court precedent.

Emergency One, 23 F.Supp.2d at 967-68 (citations omitted).

> The cases on which the defendants rely ... date from a period in which, interstate commerce being narrowly defined, and federal power to regulate such commerce being deemed exclusive, ... a state statute limited to intrastate commerce would have some, albeit a strictly limited, scope and could not have a greater scope no matter how much the state wanted it to. The cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute, and the Constitution has since been reinterpreted.

***20** *In re Brand Name Prescription Drugs Antitrust Litig.,* 123 F.3d at 612-13 (citations omitted). [FN25] Authors of learned articles have also accepted the premise argued by Plaintiffs:

> FN25. The Alabama Supreme Court rejected the conclusion of the Seventh Circuit in *In re Brand Name Prescription Drugs* regarding the scope of the Alabama antitrust statute and held that the scope was exactly the same today as it was when the statute was passed. *Archer Daniels Midland Co.,* 746 So.2d at 987-88.

> At various times, many state courts concluded that their jurisdiction was limited to activities that either were not involved in interstate commerce

> or which had no effect on interstate commerce. Many of those decisions--at least those based on perceived limits imposed upon the states by federal law--are of dubious vitality today.
> For a half century after the Sherman Act's passage, courts and many commentators adopted a rather facile distinction between the proper jurisdictional limits of federal and state antitrust law. Federal law applied to restraints that were 'in or affecting' interstate commerce. State law, on the other hand, applied to purely 'local' restraints.
>
> * * *
>
> In other words, the classification of restraints [of trade] as purely intrastate and thus within the exclusive jurisdiction of state antitrust, or interstate and thus within the exclusive domain of federal law has long since passed....

Hovenkamp, *supra*, 58 IND. L.J. at 376. [FN26]

> FN26. *See also* David W. Lamb, Note, *Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce*, 54 VAND. L.REV. 1705 (2001).

These statements accurately describe and explain the Tennessee Supreme Court's holding in *Standard Oil*. The Court strove therein to interpret the statute in a way that would make it constitutional under then prevailing law. It considered the bounds of the statute to be limited only by restraints originating in the United States Constitution. It attributed intent to the legislature based upon the presumption that that body did not intend to enact a statute that was violative of those restraints. The Court was interpreting the Constitution. Most significantly, it held that the legislature "did not intend to stop short of its power or to exceed it." 117 Tenn. at 643, 100 S.W. at 711.

The Court in *Standard Oil* did not base any limitations in the statute's application on the language of the Act itself. There is good reason for that, as the language contains no such limitations. The language of the statute is broad and does not evidence an intent to limit its application. Nowhere in the statute do the words "predominant" or "intrastate" appear. The legislature clearly intended to prohibit arrangements tending to lessen free competition in "the importation or sale of articles imported into this state" and tending to affect the price to "producer or consumer" of "such product or articles." From the language of the statute itself, including the original preamble [FN27], we simply cannot conclude that the legislature intended to limit the application of the statute geographically other than the effect on competition and prices in Tennessee. Limitation in its scope would not further the expressed purpose of the Act.

> FN27. The preamble to the 1903 Act, which was identical to that of the 1897 Act, provided:
> An act to declare unlawful and void all arrangements and contracts, agreements, trusts or combinations made with a view to lessen, or which tend to lessen free competition in the importation or sale of articles imported into this state; or in the manufacture or sale of articles of domestic growth or of raw material; to declare unlawful and void all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price of such product or articles to producer or consumer of any such product or articles; to provide for forfeiture of the charter and franchise of any corporation, organized under the laws of this state, violating any of the provisions of this act; to prohibit every foreign corporation, violating any of the provisions of this act, from doing business in this state; to require the Attorney General of this state to institute legal proceedings against any such corporations violating the provisions of this Act, and to enforce the penalties prescribed; to prescribe penalties for any violation of the act; to authorize any person or corporation damaged by any such trust, agreement or combination, to sue for the recovery of such damages, and for other purposes.
> 1903 Tenn. Pub. Acts, ch. 140 § 1; *see also State ex rel. Astor*, 104 Tenn. at 722, 59 S.W. at 1034 (quoting the preamble to the 1897 Act).

Thus, the only limitation placed on the scope of the statute has been a judicial one, impelled initially by federal interpretations of U.S. Constitutional provisions, the Supremacy Clause and the Commerce Clause. It is well settled that courts have a duty to construe a statute to avoid a constitutional conflict. *State v. Burkhart,* 58 S.W.3d 694, 697-98 (Tenn.2001). Courts should adopt the plausible construction that avoids undermining the statute's constitutionality. *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 529-30 (Tenn.1993). We must presume that an act of the legislature is constitutional. *State v. Robinson,* 29 S.W.3d 476, 479 (Tenn.2000).

***21** It was these already established principles that framed the Tennessee Supreme Court's decision and language in *Standard Oil,* and the only restriction placed on the statute's broad language was Congress's exclusive power to regulate interstate commerce. We agree with Plaintiffs and with the trial court that the *Standard Oil* court's primary concern was ensuring that Tennessee law was construed to reach as far as possible within the confines of the Constitution.

Recodifications and amendments subsequent to *Standard Oil* have not altered the sections of the TTPA defining the offenses and, consequently, the scope of the statute. Rather, it is judicial interpretation of the authority of states to enact and enforce antitrust statutes even where interstate commerce is involved that has changed or evolved since our Supreme Court last considered the scope of the TTPA. Under now well-established principles set out earlier, neither federal law nor federal interpretation of the United States Constitution precludes state antitrust laws from reaching anticompetitive conduct that affects interstate commerce but also has substantial effects on intrastate commerce. [FN28] Limitations on such authority are much less restrictive; state antitrust laws reach activities in or affecting interstate commerce, and there is an overlap between federal and state antitrust authority. Hovenkamp, *supra,* 58 IND. L.J. at 376. Consequently, "[s]tate courts frequently use state antitrust laws to condemn activities occurring outside the state if the violation has a sufficient effect within the state so that the state may justifiably assert its own law." Hovenkamp, *supra,* 58 IND. L.J. at 382.

FN28. A state's power to regulate interstate commerce is still limited in some situations; for example, by the limitations on the extraterritorial powers of state government. *See K-S Pharmacies, Inc. v. Am. Home Prods. Corp.,* 962 F.2d 728, 730 (7th Cir.1992) (holding that a state cannot regulate sales that take place wholly outside it). *See also Heath Consultants,* 527 N.W.2d at 606 (giving examples of preemption or inapplicability of state antitrust laws, generally describing them as situations involving national organizations already subject to federal legislation or national governing bodies). Some courts have applied the test promulgated by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), that is, "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits...." *Id.*

We can find no basis for a requirement that the illegal conduct predominantly affect intrastate commerce. As the court in *In re Brand Names Prescription Drugs Antitrust Litig.* found, limiting a statute today to outdated concepts of Commerce Clause jurisprudence would make state antitrust laws ineffective because there are "virtually no sales ... in the United States, that are intrastate in *that* sense." 123 F.3d at 613. Such an interpretation would be inconsistent with the purpose of the statute.

Because the legislature put no words in the statute limiting its application to conduct predominantly affecting intrastate commerce, because our highest court has determined that the legislature intended the scope of the statute to extend as far as allowed by the United States Constitution, and because the allowable scope has greatly expanded, we conclude that Tennessee's Trade Practices Act applies to illegal conduct that substantially affects commerce within this state. That is the generally accepted test for application of state antitrust laws. [FN29] *Emergency One,* 23 F.Supp. at 969 (holding that a

standard extending the scope of the Wisconsin antitrust statute to unlawful activity which has significantly and adversely affected trade and competition in the state is consistent with judicial interpretations of the scope of federal antitrust law as well as the purpose of the state statute); *Hovenkamp, supra,* 58 IND. L.J. at 387 ("... one must look at the state's interest sought to be protected. That interest is measured in part by examining the effect that the transaction had within the state or upon the people whom the state protects").

> FN29. This is the same test used by federal courts to determine if the Sherman Act can be applied to a primarily local restraint of trade. *McLain,* 444 U.S. at 510, 100 S.Ct. at 244. It is also the approach taken with regard to the Sherman Act's application to anticompetitive conduct occurring outside this country. "[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.,* 509 U.S. 764, 795, 113 S.Ct. 2891, 2909, 125 L.Ed.2d 612 (1993).

***22** Plaintiffs have alleged that Microsoft monopolized the Intel-compatible PC operating system software market and that, as a result, Plaintiffs and other purchasers of Windows have paid higher prices than they would have in a competitive market free of Microsoft's alleged illegal conduct. They also alleged that Microsoft sells or licenses its operating systems software throughout the State of Tennessee, that Microsoft has profited substantially by the sale and licensure of its operating systems to Tennesseans, and that Microsoft's conduct has had the following substantial adverse effects on commerce inside the State of Tennessee: (1) Competition between actual and potential competitors in the Tennessee market for Intel-compatible PC operating systems has been restrained, eliminated and foreclosed; (2) Actual and potential competitors in the Tennessee market have been injured in their business and their property; (3) Purchasers, including indirect purchasers, in the Tennessee market have been deprived of the benefits of a free, competitive, innovative, and unrestrained market; (4) Purchasers, including indirect purchasers, in the Tennessee market have had to pay artificially high and non-competitive prices; and (5) In place of a free, open and competitive market, a monopoly in the Tennessee market has been maintained.

Similar allegations have been found sufficient to sustain actions under other state's antitrust laws. *In re Terazosin Hydrochloride Antitrust Litig.,* 160 F.Supp. 1365 (holding that defendants' anticompetitive acts had a significant and adverse impact on consumers in the state, forcing them to pay artificially high prices in a nationwide conspiracy to forestall competition); *In re Cardizem CD Antitrust Litig.,* 105 F.Supp.2d 618 (holding that an alleged anticompetitive agreement had significant effect on price competition in the state); *United States v. Microsoft Corp.,* 87 F.Supp.2d at 55 ("assuming that each of those [19] states has, indeed, expressly limited the application of its antitrust laws to activity that has a significant adverse effect on competition within the state or is other contrary to state interests, that element is manifestly proven by the facts presented here...."); *Allied Chemical & Dye Corp.,* 101 N.W.2d at 135 (holding that the public interest and welfare of the people of that state are substantially affected if prices of a product are fixed or supplies thereof are restricted as a result of an illegal arrangement). *See also In re S.D. Microsoft Antitrust Litig.,* 657 N.W.2d 668 (S.D.2003) (upholding certification of class of indirect purchasers who alleged Microsoft's monopolistic conduct eliminated competition in the operating system software market, deprived purchasers of the benefit of a free market, and forced them to pay artificially high prices, and finding the consumers met their threshold of showing harm).

We conclude that Plaintiffs have sufficiently alleged substantial effects on commerce within this state to state a claim under the TTPA.

V. Indirect Purchaser Standing Under the TTPA

***23** The trial court herein determined that indirect purchasers could sue under the TTPA because they could not sue under federal law. While we agree that indirect purchasers are persons within the Act's provision on private remedies, we do so on the basis of our reading of that statute, not on the basis of

Standard Oil. We have already determined that *Standard Oil* limited the scope of the TTPA only to the extent of federal Constitutional restraints, but we conclude that holding is related to the scope of the statute defining the offense, not to the provision establishing the right to remedy. In other words, we affirm the trial court's holding, but for different reasons.

In 1977, the United States Supreme Court held, in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), that indirect purchasers have no cause of action pursuant to federal law because they suffer no legally cognizable injury. Section 4 of the Clayton Act allows suit by a party "injured in his business or property," and the Court reaffirmed its holding in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 88 S.Ct. 224 (1968) that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution," is the party suffering that injury. *Illinois Brick,* 431 U.S. at 728, 97 S.Ct. at 2066. Thus, the Court determined that direct purchasers suffer the entire injury that is a consequence of violation of federal antitrust laws and could collect the entire overcharge.

In *Hanover Shoe,* the Court had rejected a defense to an antitrust claim based on the theory that the direct purchaser had suffered no real injury because any illegal overcharge had been passed on to the ultimate customers or consumers. The Court held that direct purchasers could pursue antitrust claims regardless of whether they had absorbed or passed on the overcharge resulting from anti- competitive conduct. The Court in *Hanover Shoe* reasoned that to hold otherwise would complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits. The court also was concerned that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality" because direct purchasers "would have only a tiny stake in the lawsuit" and hence little incentive to sue.

In *Illinois Brick,* the Court reaffirmed *Hanover Shoe* and determined that the pass-on theory could not be used offensively by indirect purchasers claiming the illegal overcharge was actually passed on to them. *Illinois Brick,* 431 U.S. at 728-29, 97 S.Ct. at 2066. The Court stated:

> We decline to abandon the construction given § 4 [of the Clayton Act] in *Hanover Shoe* that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" within the meaning of the section in the absence of a convincing demonstration that the Court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that neither party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.

***24** *Id.* 431 U.S. at 728, 97 S.Ct. at 2066.

The Court expressed concern that allowing offensive use of the pass-on theory would create: (1) the risk of multiple liability for the defendant, i.e., recovery by both the direct and indirect purchasers of the entire overcharge; (2) difficulty in apportioning the responsibility for the overcharge among those in the chain of distribution; and (3) lack of incentive for the direct purchasers to sue. In addition, the Court was concerned that allowing suit by indirect purchasers would lead to highly complex litigation because of the necessity of determining the proportion of the overcharge that was passed on to indirect purchasers. *Id.* 431 U.S. at 732, 97 S.Ct. at 2067-68.

> [T]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in a courtroom.

Id. 431 U.S. at 731-32, 97 S.Ct. at 2067 (citations omitted). The Court reaffirmed the direct purchaser rule in *Kan. v. Utilicorp United, Inc.,* 497 U.S. 199, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990).

Clearly *Illinois Brick* addressed only federal law. In *Cal. v. ARC Am. Corp.,* 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989), a case involving claims of a nationwide conspiracy to fix cement prices in violation of the Sherman Act and a number of state antitrust laws, the plaintiff direct purchasers objected to payment to indirect purchasers any portion of the settlement fund, arguing that claims

by indirect purchasers under state antitrust law were preempted by federal law and that allowing indirect purchasers a cause of action under state antitrust laws would frustrate federal law. The Supreme Court held otherwise and made clear that states are free to determine the issue themselves.

> It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law. As construed in *Illinois Brick*, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.

490 U.S. at 103, 109 S.Ct. at 1666. The Court re-emphasized this holding, stating, "When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws." *Id.* 490 U.S. at 105, 109 S.Ct. at 1666. The Supreme Court declined to impose on states the policy, designed to further federal antitrust legislative purposes, of deterring violations by simplifying litigation. Thus, states can, but are not required to, provide a remedy to indirect purchasers under state law. Whether to do so is a policy decision left to the legislature. *See Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 108 (Fla.Dist.Ct.App.1996) (stating "issues such as whether deterrence, compensation, or efficient judicial administration should be promoted by antitrust laws and whether and to what extent these goals can or should be harmonized are fundamental policy decisions for the legislature of each state").

***25** After *Illinois Brick*, a number of states amended their antitrust laws to specifically cover indirect purchasers. [FN30] In those states adopting "*Illinois Brick* repealer statutes," the legislature has clearly expressed its intent, and courts have interpreted those statutes as allowing indirect purchasers to sue under state law. *See, e.g., Union Carbide Corp. v. Superior Court*, 36 Cal.3d 15, 201 Cal.Rptr. 580, 679 P.2d 14, 17 (Cal.1984) (observing that "California's 1978 amendment ... in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution"); *A & M Supply Co. v. Microsoft Corp.*, 252 Mich.App. 580, 654 N.W.2d 572, 595 (Mich.Ct.App.2002) (holding that Michigan's adoption of an *Illinois Brick* repealer law incorporating "directly or indirectly" language to describe the injury allowed suit by direct or indirect purchasers); *In re Microsoft Antitrust Litig.*, 2001 WL 1711517, at *2 (Me.Super.Ct. Mar. 26, 2001) (holding that the passage in Maine of an *Illinois Brick* repealer in 1989 reflected an intent to fill the gap that prohibited indirect purchaser suits and referring to legislative history mentioning *ARC America*).

> FN30. In *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 448 (Iowa 2002), the Supreme Court of Iowa stated that nineteen states, the District of Columbia, and Puerto Rico have adopted statutes expressly authorizing suits by indirect purchasers, citing statutes from California, Hawaii, Illinois, Kansas, Maryland, Michigan, Minnesota, New Mexico, New York, South Dakota, Wisconsin, and the District of Columbia.

Some state legislatures have allowed an action on behalf of indirect purchasers but limited that right. *See, e.g., Gaebler v. N.M. Potash Corp.*, 285 Ill.App.3d 542, 221 Ill.Dec. 707, 676 N.E.2d 228, 230 (Ill.Ct.App.1996) (holding that the Illinois Antitrust Act's provision that "no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims" precluded private plaintiffs' class action on behalf of indirect purchasers); *Davidson v. Microsoft Corp.*, 143 Md.App. 43, 792 A.2d 336, 341 (Md.Ct.App.2002) (noting that the legislature had rejected a bill that would have repealed the *Illinois Brick* principle as to all plaintiffs but had, instead, later passed a limited amendment allowing governments to sue regardless of whether they dealt "directly or indirectly" with the violator); *Siena v.*

Microsoft, 796 A.2d 641 (R.I.2002) (noting Rhode Island antitrust statute limited right to bring damages action on behalf of indirect purchasers to Attorney General as *parens patriae*).

Tennessee has not adopted an *Illinois Brick* repealer amendment. Some courts have considered their state legislature's failure to enact specific legislation addressing indirect purchasers after *Illinois Brick* in determining legislative intent. *See, e.g., Vacco v. Microsoft Corp.,* 260 Conn. 59, 793 A.2d 1048, 1059-60 (Conn.2002) (stating the court was mindful of *Illinois Brick* repealer bills that had been introduced in the state legislature but never enacted, setting out statements from legislative history of those attempts, and acknowledging "the inferential value of failed attempts to amend existing laws with respect to the intent of the legislature to acquiesce in prevailing judicial interpretations of such laws"); *Davidson,* 792 A.2d at 341 (stating that a 2001 unsuccessful attempt to amend the statute to permit suits by private party indirect purchasers was consistent with the court's conclusion that only governmental indirect purchasers could sue, but pointing out that mere introduction of a bill does not establish legislative intent).

***26** This court addressed the same situation in *Blake v. Abbott Labs ., Inc.,* and held:

> To support their position that a similar restriction [the *Illinois Brick* preclusion of indirect purchaser claims] is applicable to actions under the Tennessee Trade Practices Act, [defendants] assert that The General Assembly of Tennessee on three occasions has sought to pass legislation to expressly confer standing on indirect purchasers. We simply note that proposed legislation, not enacted, has no consequence whatever upon the interpretation of an existing statute. While such proposed legislation may indicate to some extent some of the individual legislators' interpretation of an existing statue, it is in no way controlling or, for that matter, relevant, to the court's duty to properly construe statutes.

Blake, 1996 WL 134947, at *3.

This conclusion regarding the effect of failed efforts to amend legislation appears contradictory to that expressed by this court in *Forman,* which involved the question of whether worker's compensation insurance was a product or article under the TTPA. This court relied on the Tennessee Supreme Court's decision in *McAdoo Contractors, Inc. v. Harris,* 222 Tenn. 623, 439 S.W.2d 594 (1969), that claims of restraint of trade in the bidding and award of construction contracts could not be brought under the TTPA because that statute applied to articles, not services, to find that insurance was not an article.

We also noted that after the *McAdoo* decision, many attempts had been made in the General Assembly to expand the scope of the TTPA, including one in 1978 to add "services" to § 47-25-101. None was successful. This court relied on the principle that failure of the legislature to express disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction, as expressed in *Hamby v. McDaniel,* 559 S.W.2d 774, 776 (Tenn.1977). Although this court acknowledged that unsuccessful attempts at legislation are not the best guides to legislative intent, it also noted that courts have held that nonaction by a legislative body may become significant where proposals for legislative change have been repeatedly rejected. *Forman,* 13 S.W.3d at 373. The court noted that if the statute were intended to be as broadly applicable as argued, there would simply have been no need for the attempts to amend it.

Any apparent conflict between *Blake* and *Forman* on the significance of legislative failure to amend is explained in the context of the case before us. While the *Hamby* principle remains good law, *see Storey v. Nichols,* 27 S.W.3d 886 (Tenn.2000), it is applicable where there has been a judicial interpretation of the statute at issue. In *Forman,* the highest court in this state had interpreted specific language of the TTPA; when another request to interpret that same language presented itself, the court was entitled to presume that the legislature's inaction indicated agreement with the prior interpretation.

***27** In *Blake,* however, the court considered the Tennessee legislature's inaction in amending a state statute in reaction to a federal court interpretation of a federal statute. The effect of the *Illinois Brick* ruling on state statutes was not clarified, in general, until *ARC America,* and, in specific, until rulings on each state's statutes. Thus, we cannot presume that

the Tennessee legislature considered *Illinois Brick* to affect the state's antitrust act or that any amendment was necessary. We assign no specific legislative intent to the failure to enact an *Illinois Brick* repealer.

In states where the legislature has not adopted a statute in response to *Illinois Brick*, state courts have searched the language of the state antitrust statutes for other indications of the legislature's intent regarding indirect purchasers. Many have found that intent in language directing how the state statute is to be interpreted, particularly language directing harmony with federal court interpretations of federal law.

In *Major v. Microsoft Corp.*, 60 P.3d 511 (Okla.Ct.App.2002), the court found dispositive language in the Oklahoma Antitrust Reform Act (1) describing those persons entitled to relief under the state statute in almost identical terms as federal law, the Clayton Act, "any person who is injured in his or her business or property by a violation of the act," and (2) the controlling section of the Oklahoma Act stating that the provisions of that act "shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S .C. § 1 et seq. and the case law applicable thereto." 60 P.3d at 513. The court interpreted these two sections as requiring it to apply *Illinois Brick. Id.*

In *Vacco v. Microsoft Corp.*, 260 Conn. 59, 793 A.2d 1048 (Conn.2002), the court found determinative a 1992 amendment to that state's antitrust act directing that the courts be "guided by interpretations given by the federal courts to federal antitrust statutes." *Id.* 793 A.2d at 1056. After careful analysis of *Illinois Brick* and other federal cases relevant to the issues raised in the case before it, the court determined that allowing only those consumers who purchase directly from the antitrust defendant to bring suit ensured harmony between the state act and federal statutes. The court distinguished cases from other states, including Tennessee, on the basis that those state statutes did not require that their state courts interpret those statutes consistently with federal interpretation. *Id.* 793 A.2d at 1059; *see also Siena*, 796 A.2d at 461 (explaining that Rhode Island statute required construction in harmony with judicial interpretations of comparable federal antitrust statutes).

In some states, the courts have had more than one indication of legislative intent or used more than one factor in their analysis. For example, in *Stifflear v. Bristol-Myers Squibb*, 931 P.2d 471 (Col.Ct.App.1996), the court construed its antitrust statute to preclude direct actions by indirect purchasers because: (1) the Colorado statute was modeled on the federal statute; (2) the Colorado Supreme Court had previously held that the state act should be interpreted consistently with federal antitrust law; (3) a 1992 re- enactment directed Colorado courts to use as a guide federal court interpretations of federal law; and (4) the same re-enactment only partially repealed the indirect purchaser preclusion by giving standing to governmental entities injured "either directly or indirectly." The court also shared the same concerns expressed by the Supreme Court in *Illinois Brick* regarding disincentive to private enforcement and difficulties in apportioning alleged overcharges. *Id.* at 476; *see also Davidson v. Microsoft Corp.*, 143 Md.App. 43, 792 A.2d 336, 341 (Md.Ct.App.2002) (holding that *Illinois Brick* applied in that state because of language in the Maryland statute that directed the courts to "be guided by federal court interpretations of federal antitrust statutes," because of prior cases using federal authority in interpreting the Maryland antitrust statute, and based on the legislative history of the act, including adoption of a right for only governmental indirect purchasers to sue); *Elkins v. Microsoft*, 817 A.2d 9, 18 (Ver.2002) (discussing the holdings of various states under their antitrust statutes and their consumer protection statutes).

***28** The Tennessee act includes no section directing the courts' interpretation. More specifically, the Tennessee legislature has not included any reference to federal antitrust law and federal interpretations of that law. Consequently, the cases listed above are useful primarily to distinguish their analysis from the one appropriate in this case. More relevant to our inquiry, although still only persuasive authority, are those decisions by other courts that do not depend upon either an *Illinois Brick* repealer or mandatory direction on interpretation.

Among those is the consideration of the issue in *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 47 P.3d 1119 (Ariz.Ct.App.2002). [FN31] Arizona's antitrust statute was enacted in 1974 by

adoption of the Uniform State Antitrust Act. The legislature adopted the portion of the uniform statute requiring construction effectuating the general purpose of making the law uniform among the states enacting the uniform law. However, the legislature added a provision that the courts "may" use as a guide interpretations given by the federal courts to comparable federal antitrust statutes. The court found that the legislature's use of the word "may" did not require it to follow federal interpretations and, consequently, it was not bound to follow *Illinois Brick.* 47 P.3d at 1126-27.

> FN31. It appears the Arizona Supreme Court has granted review of this case.

Acknowledging that the provision encouraged Arizona courts to reach interpretations consistent with those of federal courts, the court found it significant that the state statute was adopted before the *Illinois Brick* decision and, at that time, indirect purchasers could bring actions under the Sherman Act according to law prevailing in that circuit. Consequently, the court found that the legislature's failure to specifically authorize indirect purchaser claims could not be interpreted as indicating its agreement with *Illinois Brick.*

The court concluded that the statute's grant of a cause of action to "any person ... injured in his business or property" applied to individual consumers and could not be interpreted to exclude those individual consumers who were indirect purchasers. Given the public policy of the state against anticompetitive conduct, the court determined the statute must be liberally construed to carry out its purposes. Thus, the court found that "a person" includes indirect purchasers.

Similarly, in *Comes v. Microsoft,* 646 N.W.2d 440 (Iowa 2002), the court determined that Iowa's harmonization provision did not require Iowa courts to interpret its state antitrust statute the same way as federal courts interpreted federal antitrust statutes, particularly since that provision stated such harmonization "shall not be made in such a way as to constitute a delegation of state authority to the federal government." The court found the purpose of the provision was to apply a uniform standard of conduct, not to require the state to define who may sue in state courts the same way federal courts decided who could bring an action in federal courts. The court found that the language of its antitrust statute providing a remedy to a person who is injured by conduct prohibited by the act did not restrict the class of persons eligible to sue to direct purchasers. "Given the clear, broad language of the state antitrust law, we conclude [it] creates a cause of action for all consumers, regardless of one's technical status as a direct or indirect purchaser." 646 N.W.2d at 445.

***29** In *Hyde v. Abbott Labs., Inc.,* 123 N.C.App. 572, 473 S.E.2d 680 (N.C.Ct.App.1996), the court held that a 1969 (pre-*Illinois Brick*) amendment to the North Carolina statutes adding "if any person shall be injured" to the previous language granting a cause of action "if the business of any person be ... injured" indicated an intent to establish a private cause of action for any person injured by a violation of the act, including primarily consumers, and that there was no basis to conclude that the legislature intended to exclude consumers who were indirect purchasers. *Id.* at 683-84. The court found the legislature had intended to expand the class of person with standing to sue to include any person suffering an injury, regardless of whether that person purchased directly from the wrongdoer.

Although interpreting a consumer protection statute rather than an antitrust state, the court in *Elkins,* 817 A.2d at 12-13, found that the statute contained no privity requirement and that it expressly stated that any consumer, defined as 'any person' who suffers an injury, may bring an action. The court concluded that any consumer or any person included indirect purchasers.

While decisions from other states provide insight into the issues involved, our decision must be based on Tennessee's statute. That statute makes unlawful all arrangements tending to lessen competition in the importation or sale of imported and domestic articles or tending to affect the price "to the producer or **consumer**" of such goods. Tenn.Code Ann. § 47-25-101 (emphasis added). Similarly, price fixing agreements to sell and market products manufactured in this state or imported into it to any producer or **consumer** at below cost, to the injury of free competition, are also against public policy, unlawful, and void. Tenn.Code Ann. § 47-25-102 (emphasis added).

In addition to criminal sanctions, the law provides a civil remedy to "Any person who is injured or damaged by such arrangement ." Tenn.Code Ann. § 47- 25-106. Unlike the federal statute and many state statutes modeled thereon, Tennessee's statute has never included the "any person injured in his business or property" language. Combined with the use of the word "consumer" in Tenn.Code Ann. §§ 47-25-101 and -102, the statute clearly reflects an intent to protect and provide a remedy to individuals who are the ultimate consumers.

That conclusion is strengthened by other language in Tenn.Code Ann. § 47- 25-106 that allows recovery of "the full consideration or sum **paid by the person for any goods,** ... the sale of which is controlled by such combination or trust" (emphasis added). In addition, that recovery is to be had "from any person operating such trust or combination." There is no requirement that the consideration be paid directly from the injured consumer to the person operating the trust.

While the purpose of the federal antitrust statutes is to protect competition and commerce, the state act's purposes are to protect both commerce and the consuming public. It is clear that the legislature intended that consumers, or ultimate purchasers, of goods be provided a remedy for any injury, including higher prices, sustained due to the prohibited anticompetitive conduct. There is no basis to presume that the legislature intended to protect only those consumers who purchased directly from the violator. There is clear intent to the contrary. We hold that indirect purchasers are "persons" who may bring an action for an injury caused by violation of the TTPA.

***30** Our holding is consistent with that reached in *Blake v. Abbott Labs. Inc.*, wherein this court also held that the TTPA provided indirect purchasers a remedy, stating:

> It seems abundantly clear from the unambiguous provision of T.C.A. § 47- 25-106, that there is an individual right, under the laws of this state, to maintain an action against any person or entity guilty of violating the provision of Title 47, Chapter 25, whether the individual is a direct purchaser or indirect purchaser.
>
> * * *
>
> We find that the plaintiff in this case has standing to pursue an action for a violation of T.C.A. §§ 47-25-101 et seq., without reference to classification as a direct or indirect purchaser. There is no such limitation written into the statute.

Blake, 1996 WL 134947, at *3-*4. [FN32] It is also consistent with the statement in *State ex rel. Cates v. Standard Oil Co. of Ky.*, 120 Tenn. at 138, 110 S.W. at 578 that the section provided a civil remedy "in favor of any one who may be injured or damaged by the things legislated against in the first section." Of course, plaintiffs will be required to prove they were actually damaged by the alleged monopolistic conduct, *i.e.*, that they paid more for the software than they would have been required to pay absent the anticompetitive conduct.

> FN32. The two decisions by federal courts in Tennessee interpreting the remedies section of the statute provide little guidance on the issue before us. *See Volpp Tractor Parts, Inc. v. Caterpillar, Inc.*, 917 F.Supp. 1208, 1236 (W.D.Tenn.1995) (holding that Tenn.Code Ann. § 47-25- 106 provides a remedy only to customers or consumers, not to competitors and stating that, "As a competitor, Volpp never paid any consideration or sum for any product sold in violation of the statute"); *Tacker v. Wilson*, 830 F.Supp. 422, 430 (W.D.Tenn.1993) (finding that plaintiff had not stated a claim for relief under Tenn.Code Ann. § 47-25-106 because he had not alleged any facts to indicate he transacted business with any of the defendants).

The *Hyde*, *Bunker's Glass*, and *Comes* courts weighed the policy concerns raised by the Court in *Illinois Brick*. They found that allowing indirect purchasers to sue would not pose a risk of deterring lawsuits because of apportionment of recovery, observing "a defendant guilty of an antitrust violation would face paying damages to indirect purchasers under state antitrust laws as well as paying any damages awarded to direct purchasers under federal antitrust laws" and, consequently, both would have incentive to sue, *Bunker's Glass*, 47 P.3d at 1129 (quoting *Hyde*, 473 S.E.2d at 687), and also that often indirect purchasers are the only

ones who will sue, *Comes,* 646 N.W.2d at 450. These courts found the concerns over complexity and apportionment less worrisome or inapplicable in the cases before them and were sympathetic to the arguments that indirect purchasers usually suffer the real loss.

> The obvious difficulty with denying damages for consumers buying from an intermediary is that they are injured, often more than the intermediary, who may also be injured but for whom the entire overcharge is a windfall. The indirect purchaser rule awards greatly overcompensate intermediaries and greatly undercompensate consumers in the name of efficiency in the administration of the antitrust laws.

Bunker's Glass Co., 47 P.3d at 1129 (quoting PHILLIP E. AREEDA, ET AL., ANTITRUST LAW 378 (2000)). None found complexity of the litigation a reason to prohibit indirect purchaser suits, one noting that "complexity is not a foreign concept in the world of antitrust." *Comes,* 646 N.W.2d at 451. [FN33]

> FN33. Some commentators have expressed the view that state courts dealing with the question of indirect purchasers and the concerns raised in *Hanover Shoe* and *Illinois Brick* generally approach the policy questions in one of two ways. The first emphasizes the purpose of antitrust remedies as deterring violations; the other views compensation as more important and emphasizes compensation of the consumer who usually bears the cost of all or a portion of the overcharge caused by anticompetitive conduct. *See A & M Supply Co. .,* 654 N.W.2d at 580-81 (discussing and quoting extensively from William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick,* 67 ANTITRUST L.J. 1, 2 (1999)).

Any policy questions about allowing recovery to indirect purchasers have been answered in Tennessee by our legislature. The legislature has determined that the purposes of the TTPA are furthered by granting a private remedy to any person injured by anticompetitive conduct and by setting those damages at the consideration paid by those purchasers for the product. Our role is to give effect to clear legislative purpose and language. We conclude that indirect purchasers such as Plaintiffs herein may sue for injury caused them by violation of the TTPA.

VI. Plaintiffs' Claims Under the TCPA

***31** The trial court denied Microsoft's motion to dismiss the indirect purchasers' claims pursuant to the TCPA, Tenn.Code Ann. §§ 47-18-101 to -1808. Plaintiffs alleged that the unlawful arrangement in restraint of trade that was the basis for their antitrust claims was also a violation of the TCPA. Thus, the first question presented is whether anticompetitive conduct actionable under the TTPA also creates a cause of action under the TCPA.

The TCPA prohibits "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn.Code Ann. § 47-18-104(a). The Act is to be liberally construed consistently with expressed specific purposes, all of which relate to fair consumer practices, and include protection of "consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state." Tenn.Code Ann. § 47-18-102(2). In addition, the legislature has provided guidance for interpreting the TCPA:

> This part, being deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee and elsewhere, shall be construed to effectuate the purposes and intent. It is the intent of the general assembly that this part shall be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to § 5(A)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)).

Tenn.Code Ann. § 47-18-115. [FN34]

> FN34. 15 U.S.C.A. § 45(a)(1) provides:
> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

The federal provision referred to, unlike the TCPA, declares two types of offenses unlawful: (1) unfair methods of competition in or affecting commerce; and (2) unfair or deceptive acts or practices in or affecting commerce. [FN35] While the Tennessee General Assembly has chosen to include in the TCPA's prohibitions "unfair or deceptive acts or practices affecting the conduct of any trade or commerce," Tenn.Code Ann. § 47-18-104(a), it did not include unfair competition or anticompetitive acts. That choice is significant.

> FN35. The FTC and federal courts reviewing FTC actions have interpreted the "unfair methods of competition" language as applying to violations of the Sherman Act and other antitrust statutes and to actions raising antitrust issues or concerns. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22, 86 S.Ct. 1501, 1504-05, 16 L.Ed.2d 587 (1966); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95, 73 S.Ct. 361, 363, 97 L.Ed. 426 (1953); *FTC v. Cement Inst.*, 333 U.S. 683, 692-95, 68 S.Ct. 793, 799-801, 92 L.Ed. 1010 (1948). *See also* John F. Graybeal, *Unfair Trade Practices, Antitrust and Consumer Welfare in North Carolina*, 80 N.C. L.REV. 1927, 1939-51 (2002).

When originally adopted, the federal statute creating the FTC proscribed only "unfair methods of competition." Fed. Trade Comm'n Act, Pub.L. No. 63-203, § 5, 38 Stat. 717, 719 (1914). Apparently in reaction to judicial interpretation requiring a showing of injury to competition, not just to consumers, and creation of the "rule of reason," the Act was amended in 1938 to add to the FTC's enforcement jurisdiction "unfair or deceptive acts or practices." Fed. Trade Comm'n Act, Pub.L. No. 75-447, § 3, 52 Stat. 111 (1938). [FN36]

> FN36. For an explanation of the history of the FTC Act *see* John F. Graybeal, *supra;* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L.REV. 521 (1980); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L.REV. 724 (1972).

In the 1960's the FTC participated with others, including the Council of State Governments, in the development of a uniform act, the Uniform Trade Practices Act and Consumer Protection Law. [FN37] The uniform act included three alternative forms. All three included deceptive acts or practices in their definition of unlawful conduct. However, only the first alternative form also included unfair methods of competition. It was described as follows:

> FN37. Other uniform acts have also been proposed, including the UNIFORM DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 35 (1978), and the UNIFORM CONSUMER SALES PRACTICES ACT, 7A U.L.A. 1 (1978). *See* Marshall A. Leaffer and Michael H. Lipson, *supra*, at 522 n. 3. However, the genesis of the majority of state consumer protection acts can be traced to the Uniform Trade Practices and Consumer Protection Law. DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW, § 3.5 (2002). Obviously, Tennessee's enactment preceded these other uniform acts.

> ***32** This formulation has the broadest impact because it, like the present section 5 of the FTC Act, achieves antitrust as well as deceptive practice objectives. As the explanatory comments to the model legislation indicate, this language "enables the enforcement official to reach not only deceptive practices that prey upon consumers, but also unfair methods that injure competition."

William A. Lovett, *State Deceptive Trade Practice Litigation*, 46 TULANE L.REV. 724, 732 (1972) (quoting Council of State Governments, 1970 Suggested State Legislation 142)); *see also* National Association of Attorneys General Committee on the Office of the Attorney General, Report on the Office of Attorney General, 395, 399 (1971).

From the mid 1960s, states began adopting consumer protection laws, most based more or less

on one of the formats proposed in the Uniform Act. A large number adopted the version that mirrored the FTC Act, prohibiting both unfair methods of competition and unfair or deceptive acts of practices. DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:5 (2002); Marshall A. Leafler & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: the Private uses of Federal Trade Commission Jurisprudence,* 48 GEO. WASH. L.REV. 521, 531 and Appendix (1980). [FN38]

> FN38. The Pridgen book lists twenty states as adopting the "Little FTC Act" version: Alaska, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, West Virginia and Wisconsin. PRIDGEN, *supra,* § 3:5 n. 13.

Other states chose to adopt another version of the proposed model act, thereby electing to prohibit only unfair and deceptive acts and practices without including the unfair methods of competition language. Marshall A. Leafler & Michael H. Lipson, *supra,* at 531 and Appendix. When Tennessee adopted the TCPA in 1977, it chose this approach. [FN39]

> FN39. Along with a number of other states, Tennessee also adopted the approach of listing certain prohibited practices and including a general "any other practice that is unfair or deceptive" provision. The TCPA lists some thirty-three specific acts that constitute unfair or deceptive acts or practices, Tenn.Code Ann. § 47-18-104(b), all of which involve some form of misrepresentation about goods or services. In addition, there is a general catchall, "engaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn.Code Ann. § 47-18- 104(b)(27).

This history makes clear that by the time Tennessee adopted its Consumer Protection Act, its drafters and the legislators considering it had the benefit of the federal act and experience under it, the proposed Uniform Trade Practices Act and Consumer Protection Law, the statutory language adopted in many other states, and the evaluations of a number of authors of learned articles and treatises. We cannot presume other than that the Tennessee General Assembly knowingly chose not to include antitrust or anticompetitive conduct as actionable under the TCPA. *Heirs of Ellis v. Estate of Ellis,* 71 S.W.3d 705, 713-14 (Tenn.2002) (explaining the interpretation accorded the legislature's adoption of uniform laws or parts thereof).

That conclusion is further buttressed by the legislature's choice of language in the private remedy provision of the Act, which allows an action by any person injured "as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part." Tenn.Code Ann. § 47-18-109(a)(1). A deceptive act or practice involves a material representation or practice likely to mislead a reasonable consumer or the concealment or omission of a material fact. *Ganzevort v. Russell,* 949 S.W.2d 293, 299 (Tenn.1997). The TCPA generally applies to transactions between buyers and sellers, and its purpose is to protect buyers in such transactions, *Id.* 949 S.W.2d at 297-98, from unfair and deceptive practices in the conduct of commerce, *Pursell v. White,* 937 S.W.2d 838, 841-42 (Tenn.1996).

*33 Accordingly, we must presume that the legislature intended that antitrust actions, those involving harm to competition, continue to be brought under the existing antitrust statute, the TTPA. Consequently, we conclude that claims based upon anticompetitive conduct are not cognizable under the TCPA. Plaintiffs' TCPA claims based on allegations of anticompetitive conduct must be dismissed. [FN40]

> FN40. In *Blake,* the unreported opinion discussed earlier, the court held that "a viable cause of action under TTPA also states a cause of action under TCPA," 1996 WL 134947, at *5-*6. For the clear legislative history reasons stated herein, we

disagree and decline to follow that holding in *Blake*.

Other courts have reached the same conclusion. For example, in *Laughlin v. Evanston Hosp.*, 133 Ill.2d 374, 140 Ill.Dec. 861, 550 N.E.2d 986 (1990), the Supreme Court of Illinois concluded that that state's consumer fraud act was not intended to be an additional antitrust mechanism. "The language of the Act shows that its reach was to be limited to conduct that defrauds or deceives consumers or others." 140 Ill.Dec. 861, 550 N.E.2d at 986.

This is not a question of whether the TCPA can apply to conduct that is also covered by another statute. Our Supreme Court has stated that, "Even when a different code section applies and is invoked to obtain relief, the TCPA may also apply, **assuming the act or practice in question falls within the scope of its application.**" *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 926 (Tenn.1998) (emphasis added). The TCPA's provision making powers and remedies under the act cumulative and supplementary to all other powers and remedies provided by law, Tenn.Code Ann. § 47-18-112, likewise has no application to a claim based on conduct that is simply not a violation of the TCPA.

Our conclusion is based solely on the purpose of the Tennessee legislature in enacting the TCPA, as reflected in the language of the statute and the circumstances existing at the time. Irrelevant to our holding are cases relied upon by Microsoft and distinguished by Plaintiffs wherein courts in other states have ruled that because indirect purchasers have no cause of action under that state's antitrust laws, they similarly are precluded from bringing a case under that state's consumer protection statutes where both claims rest on the same conduct. *See, e.g., Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 507 (Tex.1995) (dismissing plaintiffs' claims under the deceptive practices statute because they were "in essence antitrust claims," and those claims had been dismissed under Texas antitrust law because the court would not permit "an end run around the policies allowing only direct purchasers to recover under the Antitrust Act"). [FN41]

FN41. In *Blake* this court stated that because "one cannot do indirectly what cannot be done directly," if plaintiffs had no cause of action under the antitrust statute, they similarly had no claim under the TCPA. *Blake*, 1996 WL 134947, at *19. The court concluded, however, that plaintiffs had a cause of action under both statutes. We disagree, because the two statutes cover different types of illegal conduct. *See* footnote 40.

Obviously, our holding may differ from that reached by courts in states that have adopted the "unfair methods of competition" language. *See Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla.Dist.Ct.App.1996) (holding that although plaintiff indirect purchaser could not bring an action under Florida's antitrust statute, she had standing under that state's Deceptive and Unfair Trade Practices Act because she alleged she was damaged by an unfair method of competition, relying on federal interpretations of "unfair methods of competition" in the FTC Act as including antitrust violations); *Elkins v. Microsoft*, 817 A.2d 9 (Ver.2002) (holding that the Vermont Consumer Fraud Act prohibiting unfair methods of competition was an additional state antitrust statute).

*34 Having determined that Plaintiffs' allegations of anticompetitive conduct do not state a claim for a violation of the TCPA, we must consider whether other conduct is alleged. In their brief, Plaintiffs assert that they alleged conduct that violates the TCPA separate and apart from, or in addition to, the alleged anticompetitive conduct that is the basis for their claim under the antitrust statute. We have reviewed those portions of the amended complaint referred to by Plaintiffs as examples of "varying ways in which consumers were victims of misleading, unfair and/or deceptive conduct by Microsoft." Many of those paragraphs simply allege facts regarding Microsoft's sale to OEMs in Tennessee and elsewhere and the distribution of computers with Microsoft software already loaded. There are two allegations that software was flawed and Microsoft would not repair it at its cost. Several describe the licensing procedure for end user licenses and for OEMs, including an allegation that purchasers of a pre-loaded computer may contact the computer manufacturer for a refund if they choose not to accept the terms of the licensing agreement. None of the specific factual allegations

constitutes a separate allegation of unfair or deceptive acts or practices.

The allegations in the complaint regarding the TCPA cause of action, other than the anticompetitive conduct allegation set out earlier, are, first, "advertising upgrades with the intent not to sell them as advertised, *i.e.*, the price was set by competitive market forces when in fact that was not the case," in violation of Tenn.Code Ann. § 47-18-104(b)(9). This allegation is directly related to, and an alleged consequence of, the antitrust violation allegations. The second is by "representing that a transaction involves rights which are prohibited by law," in violation of Tenn.Code Ann. § 47-18- 104(b)(12). We can find no further explanation for this conclusory allegation, and no facts supporting it. The third is "engaging in other acts or practices that are deceptive to the consumer," in violation of Tenn.Code Ann. § 47-18- 104(b)(27). Of course, this is the general catchall provision of the TCPA. No specific conduct was tied to this general allegation in the complaint.

We are unable to find any sufficient factual allegations to support the conclusory allegations that Microsoft engaged in deceptive acts or practices in violation of the TCPA other than through anticompetitive conduct and its consequences. Essentially, Plaintiffs' claims are "classic antitrust allegations dressed in" TCPA clothing, *Gaebler,* 221 Ill.Dec. 902, 676 N.E.2d at 709, or "the same claim with a different label," *Blewett v. Abbott Labs.,* 86 Wash.App. 782, 938 P.2d 842, 846 (Wash.Ct.App.1997). Consequently, Plaintiffs' cause of action based upon the TCPA must be dismissed.

VII. Conclusion

Plaintiffs as indirect purchasers have standing to bring an action for damages under Tenn.Code Ann. § 47-25-106 for injuries caused by violation of Tenn.Code Ann. §§ 47-25-101 or -102. Plaintiffs have no cause of action under the TCPA for antitrust violations prohibited by the TTPA. Plaintiffs have sufficiently alleged substantial adverse effects on commerce within Tennessee of the alleged misconduct to bring this action for violation of the TTPA.

***35** We reverse the trial court's denial of Microsoft's motion to dismiss the TCPA claims. We affirm the denial of the motion to dismiss the TTPA.

Costs of this appeal are taxed equally between the appellants Microsoft, et al., and the appellees, Daniel Sherwood, et al.

WILLIAM C. KOCH, JR., J., concurring.

I concur completely with the court's disposition of the issues in this case and subscribe to the court's thorough legal analysis except for its attempted reconciliation of the conflicting decisions regarding the interpretative significance of legislative inaction.

In *Forman v. National Council on Comp. Ins., Inc.,* 13 S.W.3d 365, 373 (Tenn.Ct.App.1999), the Middle Section of this court attached significance to the Tennessee General Assembly's failure to enact amendments expanding the scope of the Tennessee Trade Practices Act, even though it conceded that "unsuccessful attempts at legislation are not the best guides to legislative intent." Three years earlier, the Eastern Section of this court concluded that "proposed legislation, not enacted, has no consequence whatever upon the interpretation of an existing statute." *Blake v. Abbott Labs., Inc.,* No. 03A01-9509-CV-00307, 1996 WL 134947, at *3 (Tenn.Ct.App. Mar.27, 1996) (No Tenn. R.App. P. 11 application filed). Regrettably, the *Forman* court did not address the *Blake v. Abbott Labs., Inc.* decision.

In the context of statutory construction, I side with the Eastern Section. The Tennessee General Assembly should act with precision when it drafts statutes. Attaching significance to legislative inaction when it comes to interpreting statutory language dilutes the General Assembly's responsibility and can provide an avenue for the courts to import their own policy views into the process. Few scholars today attach interpretative significance to legislative inaction. William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L.Rev. 621, 640 (1990), *reprinted in* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 581 (5th ed 1992). Justice Scalia provided the reasons for this view when he observed that it is "impossible to assert with any

degree of assurance that ... [legislative] failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 672, 107 S.Ct. 1442, 1472, 94 L.Ed.2d 615 (1987) (Scalia, J., dissenting).

The plain language of Tenn.Code Ann. §§ 47-25-101, -102 (2001) covers anti-competitive acts that harm "consumers," and Tenn.Code Ann. § 47-25-106 (2001) explicitly provides a civil remedy to "[a]ny person who is injured or damaged by any such arrangement...." Thus, there is no need to reconcile *Blake v. Abbott Labs., Inc.* and *Forman v. National Council on Comp. Ins., Inc.* It should be sufficient for us to conclude in this case that the Tennessee General Assembly meant what it said when it enacted the Tennessee Trade Practices Act and leave it at that.

2003 WL 21780975 (Tenn.Ct.App.), 2003-2 Trade Cases P 74,109

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STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1959

Case No. 154

STATE OF WISCONSIN,

Plaintiff and Appellant,

vs.

COLUMBIA-SOUTHERN CHEMICAL CORPORATION, THE DOW CHEMICAL CO., and WYANDOTTE CHEMICALS CORPORATION,

Defendants and Respondents.

ALLIED CHEMICAL CORP., PITTSBURGH PLATE GLASS CO., E. I. DU PONT DE NEMOURS & CO., MERCHANTS CHEMICAL CO., CUNNINGHAM-ORTMAYER CO., BADGER CHEMICAL CO., TEWS LIME & CEMENT CO., HYDRITE CHEMICAL CO., DONALD HURLEY and BENJAMIN GREINER, co-partners d/b/a BENLO CHEMICAL CO., TOPP OIL & CHEMICAL CO., W. H. PIPKORN CO., and REICHEL-KORFMANN CO.,

Defendants.

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THE QUESTION INVOLVED

Respondents submit that the question involved is as follows:

> "May respondents be prosecuted in state courts for alleged violations of Wisconsin antitrust laws when the complained-of transactions are interstate in nature and already are covered by a Federal Trade Commission Order against these respondents, which order has been and is being enforced by repeated compliance investigations?"

The lower court answered this question in the negative.

(c) The earlier cases hold that the Federal statutes preclude state regulation of restraints of trade in interstate commerce.

In those earlier cases in which the question of pre-emption was squarely presented, the courts generally concluded that Congress pre-empted the field of antitrust regulation of interstate commerce. An early case to this effect was *Hadley Dean Plate Glass Co. v. Highland Glass Co.,* 143 Fed. 242 (CCA 8, 1906). Defendants asserted that plaintiff was party to a conspiracy to fix prices and that the contract sued on was therefore void under a state antitrust statute. Since the contract involved interstate commerce, the Court stated at page 244:

> "Of the state statute, it is sufficient to say that it can have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several states. * * *"

In *Cole Motor Car Co. v. Hurst,* 228 Fed. 280 (CCA 5, 1916), the Court came to a similar conclusion. The plaintiff brought suit on a contract for the sale of cars by a manufacturer in Indiana to an exclusive distributor in Texas. The Texas distributor alleged that the contract violated the Texas antitrust laws. Holding that the Texas law could have no application, the Court stated:

> " * * * Obviously this was an interstate shipment on an interstate contract. Obviously,

> also, since the transaction was interstate, its validity must be determined by the anti-trust laws of the United States, rather than the anti-trust laws of the State of Texas; * * *" (Page 283).

To the same effect are numerous cases in the state courts. See, for example, *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S.W. 791 (1908); *Frank A. Menne Factory v. Harback Bros.*, 85 Ark. 278, 107 S.W. 991 (1908); *J. R. Watkins Medical Co. v. Holloway,* 168 S.W. 290 (Mo. App. 1914). And in *Pulp Wood Company v. Green Bay Paper & Fiber Company,* 157 Wis. 604 at page 615 (1914), the court took the view that a transaction involving the sale of Michigan lumber by one Wisconsin corporation to another involved interstate commerce. Hence the Federal antitrust laws governed.

The appellant cites the debates which preceded the enactment of the Sherman Act in support of its argument that after the enactment of the Sherman Act the states retained the power to prohibit restraints of trade in interstate commerce. The debates referred to in appellant's brief (pp. 17-18) simply do not support this conclusion. The references do no more, we submit, than indicate that in business involving *intra*state commerce the states are left to exercise their power to regulate restraints of trade, but in matters of interstate commerce the authority to prohibit restraints of trade is vested solely in the Federal government. Of course,

the state and Federal governments both have power to punish restraints of trade but the state's power does not extend to interstate trade.

The appellant asserts (brief, p. 18) that the history of state antitrust enforcement has shown that corporations engaged in interstate commerce have not been exempt from the operation of state antitrust laws and this, of course, is conceded. *It is not the nature of the corporation that is crucial, it is the nature of the trade and commerce that determines whether state or Federal law shall apply.* A corporation engaged in interstate commerce may, of course, be subject to state antitrust laws for violations which occur in connection with transactions which are wholly intrastate. For example, the State sought to punish corporations which did business in interstate commerce in *State v. Golden Guernsey Dairy Co-operative,* 257 Wis. 254, (1950). There, however, the alleged violations related wholly to intrastate commerce; in fact, all of the alleged restraints upon trade occurred within Milwaukee County in the retail sale of milk. The fact that Bordens and National Dairies, both corporations doing business in interstate, as well as intrastate, commerce in many states, were named as defendants did not mean that the doctrine of pre-emption precluded the application of the state antitrust laws to the local sales complained of in that case.

It is on this basis that the decisions cited by appellant, all dealing with the Standard Oil monopoly (brief, pp. 19-24), are distinguish-

U.S. 283 (1959). In that case the Court reversed an Ohio decision and held that the State of Ohio antitrust law could not be enforced to invalidate a local contract fixing prices in the face of the Federal statute (in this case the Taft-Hartley Act).

To sum up: where the stream of interstate commerce has not been interrupted and the goods moving in interstate commerce do not come to rest, Federal antitrust laws govern all transactions up to and including the final delivery of the goods. In the present case at no point does the calcium chloride come to rest within the State of Wisconsin; at no point is it mingled with other similar goods within the State; and at no time can it be said that interstate commerce has ceased.

(3) The Wisconsin antitrust laws were not intended to be applied to interstate commerce.

There is nothing in the Wisconsin Statutes indicating an intention that the Wisconsin antitrust laws are to be applied to interstate commerce. The Wisconsin Statutes are no different in this connection than were the Texas statutes discussed in *Gulf, C., & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407 (CCA 5, 1898), where the court said:

> "* * * There is nothing in the language of the Texas statute, that indicates a purpose upon the part of the legislature that the

articles quoted should apply to interstate or foreign commerce." Page 420.

(See also *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S.W. 791 (1909); and the instructions to the jury quoted in the *Waters-Pierce* case, *supra*, set forth at p. 41 of this brief.)

B.

The Federal Trade Commission's Order Covering the Same Subject Matter, an Order Which the Commission Enforces by Continuing and Current Compliance Investigations, Excludes Wisconsin's Attempt to Regulate the Interstate Trade Subject Thereto in the Manner Attempted in This Case.

Even if the Federal antitrust laws, by their mere existence, did not occupy the field, the action of the Federal Trade Commission against Columbia-Southern, Dow and Wyandotte makes the case for Federal pre-emption conclusive.

Consider again what the Federal Trade Commission has done. In 1938 it charged all the nation's calcium chloride manufacturers with restraint of trade, conspiracy to establish price policies, and other violations of the Federal antitrust laws, and entered an order against the defendants barring such practices in the future. Since 1938 it has conducted several compliance investigations, the latest of which began in May, 1958, and is still under way. The extent of the F.T.C. investigations is illustrated by the mass of material furnished by Wyandotte in connec-

tries where the National Labor Relations Board had declined jurisdiction, despite the filing of a brief *amicus curiae* by the National Labor Relations Board arguing in favor of state jurisdiction.

CONCLUSION

Columbia-Southern, Dow and Wyandotte operate on a national basis and ship calcium chloride into this state only in the channels of interstate commerce. Because Congress has not indicated otherwise, the Federal antitrust laws occupy the field to the exclusion of state laws over interstate trade such as this; and because the Federal Trade Commission has asserted jurisdiction and is continuing surveillance over respondents' activities under the Federal laws, the State has no jurisdiction over this subject matter. In the language of this Court, "In such a situation, * * * the state [has] to yield".

For these reasons we submit that this Court should affirm the judgment of the Court below.

Respectfully submitted,

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STATE OF WISCONSIN

IN SUPREME COURT

No. 03-1086

GENE L. OLSTAD,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100 inclusive,

Defendants-Respondents.

APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY KREMERS, PRESIDING
CIRCUIT COURT CASE NO. 00-CV-0003042

ON CERTIFICATION FROM THE COURT OF APPEALS

NONPARTY BRIEF OF THE STATE OF WISCONSIN

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STATE OF WISCONSIN

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ON CERTIFICATION FROM THE COURT OF APPEALS

NONPARTY BRIEF OF THE STATE OF WISCONSIN

ISSUE PRESENTED

Does the Wisconsin antitrust statute, Wis. Stat. § 133.01 et seq., apply to interstate commerce affecting Wisconsin commerce?

ARGUMENT

I. THE PLAIN LANGUAGE OF THE WISCONSIN ANTITRUST STATUTE DOES NOT LIMIT ITS SCOPE TO PURELY INTRASTATE CONDUCT.

On its face, the Wisconsin antitrust statute prohibits "every" contract or conspiracy in restraint of trade. *See* Wis. Stat. § 133.03(1). The statute declares that "every" person who makes "any" contract or engages in "any" conspiracy in restraint of trade is guilty of a felony. *See id.* The statute expressly defines "person" to include virtually any company on the planet, and the statute plainly contemplates the prosecution of out-of-state defendants. *See* Wis. Stat. §§ 133.02(3) (defining "person"); 133.10(3) (providing for deposition of out-of-state defendants); 133.12 (authorizing charter revocation of foreign corporations).

Absolutely nothing in the text of the statute – even by implication – limits its application to conduct that occurs wholly within the borders of Wisconsin. In fact, quite to the contrary, the statutory text directs this Court to interpret the statute "in a manner which gives the most liberal construction to achieve the aim of competition." Wis. Stat. § 133.01. Yet Microsoft asks this Court to invent an exception in the statute for conduct that occurs outside Wisconsin. In keeping with this Court's canons regarding proper statutory construction, the Court should decline Microsoft's invitation. *See State ex rel. Kalal v. Circuit Court for Dane County*, No. 02-2490-W, 2004 WI 58, ¶¶ 44-52, ___ Wis.2d ___, ___ N.W.2d ___, 2004 WL 1152038, at *10-11 (May 25, 2004) (statutory construction should focus on language of statute itself, and in so doing "avoid absurd or unreasonable results").

II. JUDICIAL PRECEDENT DOES NOT LIMIT THE APPLICATION OF THE WISCONSIN ANTITRUST STATUTE TO PURELY INTRASTATE CONDUCT.

Microsoft hinges its argument on a long line of judicial opinions, each of which notes in passing that the Wisconsin antitrust statute applies only to intrastate commerce. All of those opinions can be traced to a pair of eighty-year old cases from a bygone era of Commerce Clause jurisprudence, *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), and *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 168 Wis. 400, 170 N.W. 230, *cert. denied*, 249 U.S. 610 (1919).

If, as Microsoft contends, the *Pulp Wood* cases are so important to this Court's decision, then of course the Court should examine what those cases say – and what they do not say. Read carefully, the language in the *Pulp Wood* opinions is hardly a basis for the sweeping proposition that the Wisconsin antitrust statute can never apply to interstate commerce. Indeed, expressly to the contrary, the Court in the second *Pulp Wood* case noted that "[b]oth" the federal and state statutes "condemn contracts or combinations in restraint of interstate trade or commerce." *Pulp Wood*, 168 Wis. at 404-05, 170 N.W. at 232.

Despite what the *Pulp Wood* cases actually say, Microsoft has morphed them into the axiomatic sources for the principle that the Wisconsin antitrust statute cannot apply to interstate commerce. Granted, Microsoft can point to several cases in the intervening decades that cite the *Pulp Wood* cases for this proposition. *See* Br. of Defendant-Respondent Microsoft Corporation at 8-9 (collecting cases). But the precise issue before the Court in the instant case – whether the statute can apply to interstate commerce at all – was not germane to any of those earlier decisions. Accordingly, none of them should constrain the Court's analysis here. As Chief Justice John Marshall observed long ago:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in

> connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Cohens v. Virginia, 19 U.S. 264, 399 (1821). *See also American Family Mutual Ins. Co. v. Shannon*, 120 Wis.2d 560, 565, 356 N.W.2d 175, 178 (1984) (this Court not bound by its own dicta).

In fact, when the Court considers a pair of Supreme Court cases previously brought by the Wisconsin Attorney General, where the Court actually had occasion to consider whether interstate commerce was within the ambit of the Wisconsin antitrust statute, the Court will conclude that its precedent does not prohibit application of the statute to interstate commerce. To the contrary, the Court will conclude that its precedents actually support such application.

In *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960), the Attorney General alleged a price-fixing conspiracy against several out-of-state corporations in violation of the Wisconsin antitrust statute. The defendants argued that they sold their goods in interstate commerce, and that therefore their conduct was subject only to the federal antitrust act, which preempted application of state law. *Id.* at 292, 101 N.W.2d at 133-34. The Supreme Court held that federal law did not preempt application of the Wisconsin antitrust statute to the interstate commerce at issue. *Id.* at 295, 101 N.W.2d at 135.

Likewise, in *State v. Milwaukee Braves*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966), *cert. denied*, 385 U.S. 1044 (1967), the Department sued the National League and the owners of its respective baseball teams, alleging that they had violated the Wisconsin antitrust statute by conspiring to move the Milwaukee Braves to Atlanta. A divided Court eventually held that the Wisconsin antitrust statute did not apply – but not because the conduct at issue involved interstate commerce, as it undoubtedly did. In fact, the Court specifically disavowed any notion that the case could be decided on that basis, stating: "The state

may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce . . . ." *Id.* at 721, 144 N.W.2d at 12 (citing *Allied Chemical*). Instead, the Court held that federal law created a special antitrust exemption for professional baseball, which preempted the application of state antitrust law. *Id.* at 730-32, 144 N.W.2d at 17-18. But for this specific baseball exemption, the Court assumed that the interstate conspiracy alleged by the Attorney General would have violated the Wisconsin antitrust statute. *Id.* at 719, 144 N.W.2d at 11.

Any attempt by Microsoft to distinguish these cases as "preemption cases" should fail: Preemption would never have been an issue if the state antitrust statute did not overlap with the federal antitrust statute in regulating some amount of interstate commerce. For these cases to make any sense, the Wisconsin antitrust statute simply must have applied (even before the 1980 amendment) to conduct occurring in interstate commerce. Not surprisingly, other courts that have considered and decided the precise issue in published opinions agree. *See In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618, 665-66 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (2003); *Emergency One v. Waterous Co.*, 23 F. Supp. 2d 959, 966-67 (E.D. Wis. 1998).[1]

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[1] In fact, only one published opinion has concluded otherwise in anything other than dicta. *See Maryland Staffing Services v. Manpower*, 936 F. Supp. 1494, 1504-05 (E.D. Wis. 1996). That opinion relied on the same mistaken reading of *Pulp Wood* that Microsoft advances here, however, and was expressly rejected by the same court two years later as "inconsistent with Wisconsin precedent." *Emergency One*, 23 F. Supp. 2d at 966.

III. LIMITING THE WISCONSIN ANTITRUST STATUTE TO PURELY INTRASTATE CONDUCT WOULD SEVERELY COMPROMISE LAW ENFORCEMENT IN WISCONSIN.

The illogical interpretation of the Wisconsin antitrust statute advanced by Microsoft would severely compromise the law enforcement capabilities of the Wisconsin Attorney General and Wisconsin district attorneys. *See* Wis. Stat. § 133.17 (entrusting Attorney General and district attorneys with prosecuting violations of the statute). Under Microsoft's theory, regardless of the harmful effects wrought in Wisconsin, putative defendants would only need to make certain that they hatched and orchestrated their conspiracies from outside this state to immunize themselves from state prosecution. That result is absurd.

Other statutes enacted by the Legislature plainly envision state antitrust enforcement that reaches beyond the borders of Wisconsin. For example, in setting forth the enforcement duties of the Wisconsin Department of Justice, the Legislature directed the Department to cooperate with federal agencies "on matters arising in *or affecting* Wisconsin which pertain to its jurisdiction." Wis. Stat. § 165.065(2) (emphasis added). By using the disjunctive "or" in that provision, the Legislature specifically contemplated that enforcement of the state's antitrust statute would involve matters "affecting" Wisconsin, even if those matters did not "arise in" Wisconsin.

Taken literally, Microsoft's argument asks this Court to issue an archaic opinion that imagines an absolute separation between intrastate and interstate commerce. In this modern age, where almost any business transaction has some effect on interstate commerce, strict adherence to this dichotomy would effectively nullify the Wisconsin antitrust statute. Moreover, as argued by plaintiff and several other *amici*, an entire class of plaintiffs – indirect purchasers injured by an interstate conspiracy – would be denied relief entirely under both federal and state law. *See Illinois Brick Co. v.*

Illinois, 431 U.S. 720, 745-46 (1977) (indirect purchasers cannot recover under federal antitrust law).

IV. THE WISCONSIN ANTITRUST STATUTE SHOULD APPLY TO CONDUCT OCCURRING OUTSIDE WISCONSIN IF THAT CONDUCT HAS A DIRECT, SUBSTANTIAL AND REASONABLY FORESEEABLE EFFECT ON COMMERCE WITHIN WISCONSIN.

Because the practical implications of its argument are so unreasonable, Microsoft itself concedes that the Court should not take the argument literally. That is, in summarizing the issue that this Court must decide, Microsoft phrased the inquiry as follows: "Does Wisconsin's antitrust act . . . apply to out-of-state conduct that predominantly affects interstate commerce?" Br. of Defendant-Respondent Microsoft Corporation at 1. Microsoft says the answer is no. Of course, phrasing the issue this way would still allow the statute to apply to conduct outside Wisconsin, so long as the "predominant" effect of that conduct occurred in Wisconsin.

Ultimately, therefore, Microsoft and the Wisconsin Department of Justice agree that the Wisconsin antitrust statute must apply to some amount of interstate commerce. That, however, is the easy question; the more difficult question is determining the appropriate standard that should govern the inquiry.

The reach of the Wisconsin antitrust statute cannot be limitless. Principles of comity and federalism limit the degree to which our Legislature may permissibly regulate conduct beyond the borders of Wisconsin. *See Emergency One*, 23 F. Supp. 2d at 968. In a similar fashion, principles of comity and international law limit the degree to which the Sherman Act may regulate conduct beyond the borders of the United States. In 1982, Congress codified some of these limiting principles in a section of the Foreign Trade Antitrust Improvements Act ("FTAIA"). *See* Pub. L. No. 97-290, § 402, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 6a). The FTAIA provides

that the Sherman Act shall not apply to conduct involving non-import transactions unless that conduct has "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. *See* 15 U.S.C. § 6a(1)(A).[2]

The extraterritorial limitations imposed by the FTAIA are analogous to the issue before this Court. Therefore, in determining the extent to which the Wisconsin antitrust statute may regulate conduct outside Wisconsin, the Department respectfully urges the Court to adopt the standard set forth in the FTAIA. *See Conley Publishing Group v. Journal Communications*, 2003 WI 119, ¶¶ 17-20, 265 Wis.2d 128, 140-43, 665 N.W.2d 879, 885-87 (explaining why Wisconsin courts should interpret our antitrust law consistent with federal antitrust law).[3] The Court should hold that the Wisconsin antitrust statute applies to conduct outside Wisconsin so long as the conduct has – or reasonably could have[4] – a "direct,

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[2] The standard adopted by Congress has its roots in the common law. *See* Restatement (Third) of Foreign Relations Law of the United States § 403(2)(a) (1987) (setting forth factors governing whether a state may prescribe conduct occurring outside its territory, including "the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory"); Restatement (Second) of Foreign Relations Law of the United States § 18 (1965) (similar language).

[3] The *Conley* Court noted that the uniform treatment of federal and state antitrust law minimizes the chance that a Wisconsin business will be subject to different standards of liability for the "same conduct," *Conley*, 2003 WI 119, ¶ 20, 265 Wis.2d at 143, 665 N.W.2d at 887, thus acknowledging the overlap between the interstate commerce regulated by both federal and Wisconsin antitrust law.

[4] There may be a case where a prosecutor or plaintiff could prove an unlawful restraint on trade that would have a "direct, substantial, and reasonably foreseeable effect" on commerce within Wisconsin, but cannot prove that the effect has actually yet occurred. That should not preclude entry of an injunction or other appropriate relief. *See State v. Waste Management of Wisconsin*, 81 Wis.2d 555, 575, 261 N.W.2d 147, 155-56 (1978) (to prove a violation of the Wisconsin antitrust statute, a plaintiff need not prove an actual effect on commerce).

substantial, and reasonably foreseeable effect" on commerce within Wisconsin.[5]

The power of the Legislature to regulate conduct within Wisconsin is a separate question. For that reason, when considering the reach of the Wisconsin antitrust statute with respect to conduct within Wisconsin, focussing on the effect of the conduct is less appropriate. If conduct occurring within Wisconsin constitutes proof of an element of the statutory violation, the statute should apply regardless of where the effect of that violation may occur, at least with respect to actions brought by the government. *See F. Hoffman-La Roche v. Empagran*, No. 03-724, ___ U.S. ___, 2004 WL 1300131, at *10 (June 14, 2004) (distinguishing between suits brought by the government and suits brought by private plaintiffs).[6] For example, the Attorney General or a district attorney should have the discretion to prosecute two Wisconsin corporations that conspire in Wisconsin to fix prices in Minnesota – even if Wisconsin citizens would feel no effect of that conspiracy. *See* 939.03(1)(a) (defendant subject to prosecution in Wisconsin if "any of the constituent elements" of the crime take place in

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[5] Of course, requiring the effect to be "direct" does not mean that indirect purchasers could not recover. *See* Wis. Stat. § 133.18 (allowing recovery by any person injured "directly or indirectly"). Furthermore, in determining whether the effect is "substantial," the inquiry should not be a relative one. For example, in the Department's view, an impermissible restraint of trade that results in a plaintiff paying a higher price in Wisconsin would be both a "direct" and "substantial" effect, regardless of the relative harm that restraint may have caused to other potential plaintiffs.

[6] Even in a case that purports to apply the Wisconsin antitrust statute based on conduct occurring in Wisconsin without regard to the effects caused in Wisconsin, defendants could still invoke arguments that the statute has been unconstitutionally applied in a particular case. *See, e.g.*, Wis. Stat. § 801.05(4) (limitations on personal jurisdiction imposed by Wisconsin long-arm statute).

Wisconsin).[7] The Department respectfully requests that the Court highlight this distinction in its opinion.

CONCLUSION

For the foregoing reasons, the Department respectfully urges this Court to adopt a legal standard in interpreting the Wisconsin antitrust statute that applies that statute to conduct occurring outside Wisconsin if that conduct has a direct, substantial and reasonably foreseeable effect on commerce within Wisconsin.

Dated this 16th day of June, 2004.

Respectfully submitted,

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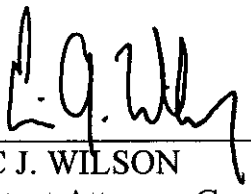
Attorney General



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[7] The same statute also provides that the state can criminally prosecute a defendant for conduct outside Wisconsin so long as the person acted with the intent to "cause in this state a consequence" prohibited by a criminal statute. *See* Wis. Stat. § 939.03(1)(c). That resolves the matter of personal jurisdiction over the defendant, but does not address the notion of whether the Legislature could have acted to regulate the conduct in the first place. This latter concept, sometimes called legislative jurisdiction, is the chief issue that the Court confronts on this appeal. *See Emergency One*, 23 F. Supp. 2d at 968-69 (distinguishing between personal jurisdiction and legislative jurisdiction).

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,678 words.

Respectfully submitted,

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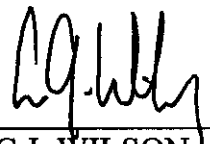

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SUPREME COURT OF WISCONSIN

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Individually and on behalf of
All others similarly situated,

Plaintiff-Appellant,

Appeal No. 03-1086

Vs.

MICROSOFT CORPORATION,
A foreign corporation, and
DOES 1 through 100, inclusive,

Defendants-Respondents.

Appeal Taken From the Final Order of the Milwaukee County Circuit Court
The Honorable Jeffrey Kremers, Presiding
Circuit Court Case No. 00-CV-003042

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ARGUMENT

Microsoft argues that the Wisconsin Antitrust Act, Wis. Stat. Ch. 133 (2001-02), contains an unexpressed limitation to intrastate transactions (or conspiracies, according to its brief in the trial court). But, as this Court said in *State ex re. Kalal v. Circuit Court*, 2004 WI 58, ¶63, "It is the law that governs, not the intent of the lawgiver." "Men may intend what they will; but it is only the laws they enact that bind us." *Id.* ¶ 52.

I. THE MEANING OF THE LITTLE SHERMAN ACT IS PLAIN

The restriction to intrastate transactions (or conspiracies) urged by Microsoft does not appear in the statute. The Little Sherman Act, Wis. Stat. § 133.03(1) and (2), provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who monopolizes, or attempts to monopolize, or conspires with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony." Statutory language is given its common, ordinary, and accepted meaning. *Kalal,* 2004 WI 58, ¶ 45. "Every" means "being each individual or part of a group without exception." *Webster's Ninth Collegiate Dictionary*, 430 (1986). "Any" means "one or some indiscriminately of whatever kind." *Id.* at 93. Every restraint of trade that is brought to the court is subject to review on the merits. "Every" includes within

its scope both legal contracts and undue restraints of trade, which are subject to review on the merits using the rule of reason. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 59-63, 31 S. Ct. 502 (1911). Thus, the geographic scope of the Little Sherman Act is all-inclusive; restraints of trade located outside the state are included in its scope.

There are only two avenues by which a restraint of trade may be removed from the operation of the statute: an express exclusion or a constitutional limitation on the scope of the act. As this Court held in *Libertarian Party of Wisconsin v. State,* 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996):

> Our legislature has plenary power except where forbidden to act by the Wisconsin Constitution. [I]t is competent for the legislature to exercise all legislative power not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States.

Except for the limitations imposed by the state or federal constitutions, the power of the Legislature is practically absolute. *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 279, 118 N.W.2d 211 (1962).

This Court gives deference to the policy choices made by the Legislature in two aspects relevant here. First, this Court will not imply a restriction on the plenary power of the Legislature where none is expressed. *Sieder v. O'Connell*, 236 Wis. 2d 211, 248, 612 N.W.2d 659 (2000); *State v. Circuit Court of Milwaukee County*, 3 Wis. 2d 439, 445, 88 N.W.2d 339 (1958). Thus, this Court will not

insert an exception, such as one for interstate restraints of trade. Second, this Court uses the United States Supreme Court's current interpretation of the federal constitution when it decides whether an act of the Legislature has crossed the federal constitutional bounds. *State v. Pitsch*, 124 Wis. 2d 628, 632, 369 N.W. 2d 711 (1985). Even if the *Pulpwood Cases*[1] stood for the principal touted by Microsoft (they do not), this Court could not follow them because the constitutional limitation those cases allegedly place on the statute are stricter than the modern commerce clause requires. As this Court noted in *WKBH Television v. Wisconsin Dept. of Revenue*, 75 Wis. 2d 557, 566, 250 N.W.2d 290 (1977), "[the case] is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition."

In fact, this Court found a prior version of the antitrust statutes constitutional under modern commerce clause tests in *State v. Golden Guernsey Dairy Coop*, 257 Wis. 254, 43 N.W. 2d 31 (1950)(ouster of foreign corporation that violated antitrust law did not unduly burden interstate commerce) and *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 295, 101 N.W. 2d 133 (1960)(antitrust act makes no attempt to regulate or burden interstate commerce). As explained more fully in the brief of the Wisconsin Farm Bureau

1 *Pulpwood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914)(*Pulpwood I*); *Pulpwood Co. v.*

Federation, *et al.*, which we join, in *Allied Chemical* this Court applied the modern interpretation of the commerce clause to the statute, and rejected the arguments now made again by Microsoft. Microsoft fails to provide any compelling reason for overruling these cases. Nor does it offer any other constitutional rationale for excluding its restraint of trade from the statute's scope.

II. THE STATUTE'S BACKGROUND SHOWS A STATUTORY SCHEME DESIGNED TO PROTECT WISCONSIN FROM OUT-OF-STATE CONSPIRACIES THAT HARMED COMMERCE WITHIN THE STATE

Microsoft completely ignores Wis. Stat. § 133.12, which requires domestic corporations and foreign corporations authorized to transact business in this state to file sworn annual reports showing whether they have entered into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. Like § 133.03, this section does not exclude restraints of trade outside the state.

The statutory background of Wis. Stat. § 133.12 shows its purpose is to reach out-of-state conduct. As explained more fully in the amicus brief of the American Antitrust Institute, which we join, late nineteenth century law gave the states considerable authority to cancel corporate charters and to revoke intrastate business privileges of foreign corporations. James May, *Antitrust*

Green Bay Paper & Fiber Co, 168 Wis. 400, 170 N.W. 230 (1919) (*Pulpwood II*) (the "*Pulpwood Cases*").

Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 135 U. Pa. L. Rev. 495, 510 (1987). States made adherence to antitrust standards a condition for acquiring a charter or a license to do business in the state. *Id.*, at 512-3. This type of statute was not an extraterritorial exercise of state power; it merely placed a condition upon the privilege of conducting business in the state. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 342-43 (1909).

Wisconsin began using its corporate law powers to combat combinations in restraint of trade in 1897, prohibiting Wisconsin corporations from entering into combinations that intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein or manufactured, mined, produced or sold in this state. L. 1897, c. 357 (now § 133.12). This initial corporate antitrust law, however, was ineffective: it only applied to Wisconsin corporations and did not provide a penalty.

In 1901, the Governor requested the Legislature to strengthen the "antitrust law" (meaning Chapter 357, discussed above), encouraging it to exercise its power to the fullest extent permitted by the federal constitution:

> The line where the power of the State ends and the power of the National government begins may be difficult to define, but, the State having some power in the matter, the duty of the State government is exactly commensurate with the limits of its powers.

State of Wisconsin, Assembly Journal, 45th Sess. 48, (1901); App. A .

The Governor repeated his request in 1903, noting that,

> there are no trusts of the first class native to this State. Yet few States perhaps suffer more directly from the influences of these artificial monopolies of trade than our own. The State law gives us absolutely no protection against corporations organized outside the State, yet depending for their profits upon tribute exacted from the people of this and other States by disregard or abuses of the common rights of our citizens under the common law.

State of Wisconsin, Assembly Journal, 46th Sess. 86-7, (1903); App. A.

In 1905, responding to the Governor's call for laws to be enacted to, among other things, restrain the operations in this state by such combinations organized elsewhere, (State of Wisconsin, Assembly Journal, 47th Sess., 86-8 (1905); App. A), the Legislature amended the domestic corporation antitrust law and also added a provision applying to foreign corporations:

> Any foreign corporation which shall enter into any combination ...intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its license or authority to do business in this state cancelled and annulled.

Wis. Stat. § 1791(j-l) (1906), L. 1905. c. 506 (now § 133.12).

In 1923, the Legislature combined the foreign and domestic corporation antitrust statutes with the Little Sherman Act to form the original version of Chapter 133. L. 1923, c. 291. The statutes are *in pari materia.* By tying together

the two strands of Wisconsin antitrust law, the legislature demonstrated its continued commitment to using state antitrust law to protect Wisconsin residents from all kinds of harmful anticompetitive conduct, be it local or national. Moreover, by including the ouster provision in the broader antitrust statute, the legislature provided an additional penalty for violating the substantive provisions of the act, thus punishing any anticompetitive conduct that harms Wisconsin's economy. *Golden Guernsey Dairy Coop.*, 257 Wis. at 265-66.

In 1980, when the legislature repealed and re-enacted Wisconsin's antitrust law, it retained the domestic and foreign corporation antitrust statutes as Wis. Stat. § 133.12, evidencing, along with the statement of policy in Wis. Stat. § 133.01, its continued intent to use the full extent of its authority to deal with out-of-state conspiracies.

Indeed, the statutory background disproves an assumption underlying Microsoft's argument: that the Legislature supposedly knew that the Act was limited to intrastate conduct, and was content to leave the limitation in place. The statute tells a different story: the Legislature was determined to protect Wisconsin's economy from anticompetitive conduct, no matter where it occurred, by strengthening the act. The 1917 Whittet Act, L.1917, c.646, §2 (now § 133.14) strengthened the penalties for restraining trade by voiding

contracts. In 1921, the Legislature created a Department of Markets, now part the Department of Agriculture, Trade, and Consumer Protection, to assist in antitrust enforcement. L.1921, c. 571, §2 (now § 100.20). This court, by the way, has determined that this portion of the antitrust act did not violate the commerce clause, using old commerce clause tests. *Ritholz v. Ammon*, 240 Wis. 578, 4 N.W.2d 173 (1945). In 1923, the Legislature added a criminal penalty for violations of the act. L. 1923, c. 406, § 1. In 1935, the Legislature added the provision requiring foreign corporations to file sworn statements that they had not participated in restraints of trade. L.1935, c. 97. The Legislature created the antitrust division in the Attorney General's office in 1947. L.1947, c.421, §1.

This very brief review shows the legislature acted repeatedly to strengthen the antitrust laws. It does not paint the picture of the legislature that Microsoft envisions: passive and content to allow the antitrust law to be cripplingly restricted in its scope of operation.

III. "INTRASTATE TRANSACTION" DID NOT MEAN "INTRASTATE CONSPIRACY"

The Court should be alert to a substantial shift in Microsoft's position from the trial court to this court. In the trial court, Microsoft argued that the antitrust act does not apply to out-of-state conduct that predominately affects interstate commerce; in this specific case, the act supposedly did not apply

because the predatory acts occurred outside Wisconsin. (Microsoft Br. at 3-4). Microsoft now says that the *Pulpwood Cases* held that Wisconsin law was powerless to regulate a conspiracy formed by Wisconsin paper mills because the goods were purchased out-of-state: "Clearly the Court did not consider itself free to apply either statute. *Because* the case involved *interstate* commerce, the federal statute was the statute to be applied." (Microsoft Br. at 11).

The *Pulpwood Cases*, however, involved an intrastate conspiracy involving thirteen pulp and paper mill companies in the Fox River Valley. *Pulpwood* was a contract case, in which the defendant argued that the contract was void as against public policy. The underlying antitrust issue in the *Pulpwood Cases,* on which this defense was grounded, was a joint buying agreement that eliminated competition in the purchase of pulpwood. *Pulpwood I*, 157 Wis. at 616. Green Bay Paper had been a party to this agreement but now claimed that the contract was void as an unlawful conspiracy. *Id.* In its initial decision, this Court's primary concern was whether the contract represented a legitimate joint venture or was an effort to create and exploit buyer power. *Pulpwood I, Id.* at 619-23. On the second appeal, this Court affirmed the dismissal of the Pulpwood Company's claim because the underlying contracts were against public policy as part of a conspiracy "in the spruce pulpwood market of Northern Michigan between Gladstone and the Soo. . . ." *Pulpwood II,* 168 Wis. at 413. Although it

chose federal law, this Court emphasized that, "[s]o far as this particular case goes, we observe very little difference whether the state or federal statutes or both apply." *Pulpwood I*, 157 Wis. at 616. If Microsoft's proposition in the trial court – that the federal act applies to interstate conspiracies, and the state act applies to intrastate conspiracies -- were true, then this Court would have rejected the application of federal law in the *Pulpwood Cases.*

Commerce clause jurisprudence from the era of the *Pulpwood Cases* explain what this Court means when it comments that the Little Sherman Act of 1893 applied to intrastate as distinguished from interstate transactions. This Court and the United States Supreme Court had developed definitions of interstate and intrastate commerce. Under the Original Package Doctrine, goods arriving in a state through interstate or foreign commerce became part of intrastate commerce, and subject to state regulation, when they were removed from their original packages or became mixed with goods in commerce in the state. *See, e.g. Howe Machine C. v. Gage,* 100 U.S. 676, 677 (1879)(a state cannot require a license to be taken out to sell foreign goods while remaining in the packages in which they were imported); *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 475-476, 102 N.W. 888 (1905)(opening bales for inspection did not make goods intrastate commerce because the goods had not become part of the mass of property in this state). Indeed, the language used in

the corporate statutes, which was added to the Little Sherman Act in 1921, defines what is meant by an intrastate transaction: "article or commodity in general use in this state," "constituting a subject of trade or commerce therein," and "manufactured, mined, produced or sold in this state." L.1921, c. 458, § 1. In light of the purpose of the Original Package Doctrine -- to define when goods arriving in the state by way of interstate or foreign commerce became intrastate commerce for the purpose of applying state law -- it is clear that intrastate transaction did not mean activity that was always wholly intrastate.

IV. NARROWING THE SCOPE OF WISCONSIN'S ANTITRUST LAW TO INTRASTATE COMMERCE WOULD OVERTURN SETTLED LAW

Finally, Microsoft's argument calls for a radical redefinition of Wisconsin's antitrust law. The briefs of our fellow amici highlight many of the ways that Microsoft's position would harm the public interest in preserving and protecting the competitive market as well as ensuring that victims of anticompetitive conduct have appropriate redress.

Wisconsin courts have regularly used state antitrust law to resolve disputes involving aspects of interstate commerce. Appendix B sets forth as complete a listing as we can make of cases, including unreported decisions reported by unofficial sources, that have involved Chapter 133 since 1960. Reported WI Antitrust Law Cases, 1960-Present, App. B. Approximately 40%

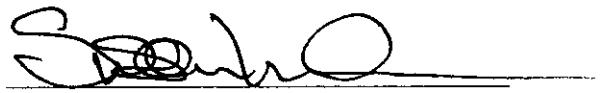
of the cases involved an enterprise that was not a resident of the state. *Id.* There has been for some time a substantial, on-going practice of using Wisconsin antitrust law to resolve important antitrust issues affecting Wisconsin's economy that involve interstate commerce. The kind of radical change in the law proposed by Microsoft would significantly impair the continued vitality of these efforts to advance the public interest in competition.

CONCLUSION

The Wisconsin antitrust act reaches conspiracies in interstate commerce that have an adverse effect in Wisconsin. The decision of the Circuit Court should be **REVERSED**.

Respectfully submitted this 16th day of June, 2004.

SUSAN LaCAVA, SC



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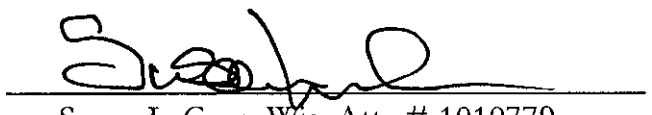
CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,778 words.



Susan LaCava, Wis. Atty # 1010779

APPENDIX

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APPENDIX B

Reported WI Antitrust Law Cases, 1960-Present.....B-1 – B-8

vide separate homes for the superintendents of the several St
institutions. The situation seems imperatively to requ
prompt and decisive action on your part.

To the several recommendations for additions and permane
improvements offered by the Board of Control, you will,
course, give due consideration. Their experience and spec
knowledge should qualify the members of the Board accurate
to estimate the future requirements of the State in this dire
tion. At the present time, I do not consider myself either p
pared to strengthen their suggestions by indorsement, or qua
fied to question them as of doubtful wisdom.

WISCONSIN NATIONAL GUARD.

From the report of the Adjutant-General it is learned that e
isting laws revised by the last Legislature for maintaining an
regulating the State Militia are generally satisfactory. Th
few changes recommended in that report are reasonable in su
gestion, modest in appropriations asked for, and plainly d
signed for the betterment of the organization. No other argu
ment in favor of approving them by legislative action should
necessary.

The value to both State and Nation of a well organized, pro
erly disciplined and thoroughly equipped militia force has bee
often and recently demonstrated. In no other part of the pub
lic service is it more apparent that the most complete efficienc
affords the best and surest economy. The lessons of experienc
have been applied in the reorganization of the Wisconsin Na
tional Guard, following the Spanish-American War. Notwith
standing that the work has been performed almost wholly with
new men, and, at times, with insufficient equipment, all infor
mation available to the Executive at this time indicates distinc
progress and improvement in the character of organization an
training. The State cannot afford to permit its guards to lac
in the highest degree of proficiency through want of proper an
reasonable equipment.

TRUSTS AND MONOPOLIES.

The evils to be reached by legislation on trusts and monop
olies are such combinations and confederations as are organ
ized to control prices, create monopolies and destroy compet
tion, or which, in their practical working, have that effect.

It is not because a corporation has a large capital or transact
a large and profitable business that it is an injury to the com
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the country.

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In the next place, it only
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business transactions within

gregations of capital absolutely necessary, and such capital is fairly entitled to a reasonable and legitimate profit. The wrong is done and the injury inflicted when such combinations of capital are enabled, by means adopted for that purpose, to control prices, stifle competition and create a monopoly.

The decisions of the highest courts of the United States, and of the several States, leave no room to doubt that the power of the legislative branch of the government is ample to redress all wrongs so done to society. The decisions of the courts are practically uniform to the effect that no one has any right to enter into any agreement or combination when the purpose or the effect is to control prices or create a monopoly. Further, it is also apparent that the right to prohibit such contract or combination is clear, when the object is to control prices, even if it is not intended unreasonably to increase prices. It is along these lines that the anti-trust legislation of Congress known as the Sherman law was enacted, and also similar legislation by the several States. With only some unimportant exceptions, such legislation has been uniformly sustained by the courts. It is expected that during the present session the United States Senate will pass the House bill extending the scope of the Sherman law, increasing its penalties and making prosecutions under it mandatory on the part of United States district attorneys of the country.

Evils of this kind exist and are in operation in every State. Their extent and harmful effect may or may not have been exaggerated in the public estimation, but all must agree that there is much that ought to receive the consideration of the legislative branch of the State government. The present law of this State on the subject is principally contained in chapter 357 of the General Laws of 1897. I regard it as entirely insufficient, either as a remedy or a restraint. In the first place it only applies to corporations. It is entirely plain, however, that partnerships and individuals may enter into agreements and combinations, which, in their results, will be just as disastrous to the public interests as can any confederation of corporations. It is not perceived that the corporate character of the party doing it makes the controlling of prices, or the creating a monopoly, any more or less hurtful than if the same thing was done by a partnership or individual.

In the next place, it only denounces such combinations when entered into by corporations organized under the laws of this State. It is of course known that the whole subject of interstate commerce is under our system exclusively a matter of Federal cognizance; but surely the State has some control over the business transactions within its limits, even by foreign corpor-

ations. It is a large subject. The line where the power of the State ends and the power of the National government begins may be difficult to define, but, the State having some power in the matter, the duty of State government is exactly commensurate with the limits of its powers.

Furthermore, the only remedy provided or suggested by the present statute is a proceeding in the courts to vacate the charter and annul the existence of the offending corporation. Such a remedy is to a great extent illusory. Corporations must of necessity act by officers and agents, and it is submitted that one efficacious way to control the corporation is to act upon the individuals who control its affairs and shape its policy. I recommend to the Legislature of this State an entire revision of the laws relating to this subject, and the enactment of such laws as shall promise an efficient remedy for the great evil, and which at the same time shall not hamper individual enterprise or take from capital the reasonable returns to which it is fairly entitled when invested in business enterprise.

I think legislation should be adopted providing that if any corporation organized under the laws of this or any other State, or any partnership or association of individuals, or any individuals, shall enter into, or become a member of, or a party to, any trust, agreement, combination, confederation or understanding with any other corporation, partnership, person, or association of persons, to regulate or fix the price of any commodity or to limit the amount of any commodity to be manufactured, mined, sold, transported or placed on sale or disposed of, or to do, or to refrain from doing, any other thing with the intent to control and fix the price of any commodity to be manufactured, mined, sold or transported in this State, such corporation and the officers and agents thereof, and such partnership, individuals and associations of persons, shall be deemed guilty of a conspiracy to defraud, and shall be subject to such prosecution and punishment and such penalty or forfeiture as may, in the judgment of the Legislature, be proper.

Such enactment should also contain suitable provisions making all such contracts and agreements void, and provide machinery for the collection of such penalties and forefeitures, and for the annulment of the charter of such offender, if a domestic corporation, and for the forfeiture of the right to do business in this state if a foreign corporation, and imposing such penalties on the individuals convicted of violating the law, as may be appropriate.

COMBINATIONS IN RESTRAINT OF TRADE.

The growth in number as well as in magnitude of combinations to enhance profits through creation of monopoly, or by restraint of legitimate trade, has become recognized throughout the country as one of the chief dangers to the rights of the individual, as well as a constant menace to the general prosperity of the Commonwealth. Conditions originating in the strike by anthracite coal miners and plainly maintained by combinations which control coal mine owners, transportation companies, and coal dealers, merely emphasize and make apparent to every mind the necessity of a remedy for these evils. That the right to control organizations and powers of its own creation is inherent to government admits of no question. How to exercise this right without the adoption of revolutionary methods and a disregard of rights of individuals and property heretofore considered sacred and protected by constitutional law, is the question pressing for answer. To assume that a remedy cannot be provided in legal form and manner is to admit the failure of government in its most important functions. To assert that laws have been framed adequate fully to meet the emergency, either by National or State legislation, is to assail the most apparent indisputable facts with sheer presumption.

Yet much has been accomplished to limit the encroachment by these great combinations of capital and power, through both Federal and State laws, without injury to any legitimate enterprise or interest. Without doubt much more will be accomplished, as the subtle methods and influences employed become more generally and better understood, and united intelligent efforts are applied to the correction of the abuses practiced. Meanwhile, there can be no difference of opinion among honest men respecting the duty of legislators and public officials to enlist every power and to exercise every right under the Constitution to secure the largest possible measure of relief from the dangers presented and threatened.

The so-called anti-trust law of Wisconsin is an act without force or effect under existing conditions. It applies only to corporations organized in Wisconsin. There are no trusts of the first class native to this State. Yet few States perhaps suffer more directly through the influences of these artificial monopolies of trade than our own. The State law gives us absolutely no protection against corporations organized outside the State yet depending for their profits upon tribute exacted from the people of this and other States by disregard or abuse of the common rights of our citizens under the common law.

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In my judgment the coal famine now existing throughout this State presents a subject calling for prompt legislative inquiry with full exercise of the large powers granted to legislative committees. Such inquiry should be conducted with a view to ascertaining what, if any, combinations within this State, or agencies of combinations organized outside the State, compel thousands of our citizens to suffer from lack of fuel, which is furnished in abundance to other citizens although at prices unreasonable and unwarranted under natural trade conditions, even after making full allowance for necessary shortage in coal on account of the miners' strike last year. If the citizens of this State are being victimized, by conspiracies of men within as well as without the State, I believe that the powers of the State are ample to enact and enforce laws to prevent repetition of the offenses in future, even if those who are guilty cannot be punished under existing laws for present wrong-doing.

I renew the recommendation made to the Legislature two years ago for an entire revision of the laws relating to this subject, and the enactment of such laws as shall promise most efficient remedy for the existing evils without hampering legitimate individual enterprise, or taking from capital reasonable returns to which it is fairly entitled when invested in business. In consideration of the experience and examples afforded by legislation on this subject in other States, I desire to emphasize for your attention the importance of providing most specifically the form and manner for enforcement of such laws as you may enact for the prevention of illegal combinations within the State, to restrain the operations in this State by such combinations organized elsewhere, and for the punishment of violators of such laws. An examination of legislation of this character in the several States affords evidence that prohibitory laws are most abundant, but that the most of them are found lacking and inefficient through failure to provide means for their enforcement, or to prescribe suitable penalties for their violation.

EDUCATION.

Two years ago the attention of the Legislature was urged to consideration of the pressing need of reorganization of the work of district schools. It cannot be complained that the State has been negligent in the matter of financial aid to the common schools, but the official statistics of school attendance reveal the necessity of something more than money expenditure if the district school is to retain a degree of usefulness at all commensurate with its cost. Figures taken from the reports in the de-

for the proper inspection of railroad appliances and for a report to be made on the condition and working of all air and power brakes, fixtures and automatic or safety couplers, heating apparatus, train signals and other appliances connected with the running of trains, the condition and connection of the working of yard and switch lamps set for safety signals, switches and interlocking frogs or guard rails, whether the same are in block or otherwise as required by law and the condition and sufficiency of bridges. Certainly effectiveness of these appliances will depend upon their being kept in working order and it is apparent that there should be frequent and vigilant examinations and tests if they are to serve their purpose of protecting life. The observation of these requirements should be exacted by the imposition of penalties for failure to observe the law on the subject, and it ought to be provided that any employee of the company injured because of failure to use the required appliances or to fail or neglect to observe all of the provisions of the law with respect thereto, may recover damage of the company to the amount of his injury although he may have continued in the employment thereof after knowledge of such failure on the part of the company to comply with the provisions of law in that respect. Attention has been called somewhat at length to provisions for the safety of the traveling public and employees of railway companies engaged in the service of operating their trains and cars. It would seem to be justified by the importance of the subject.

Combinations in Restraint of Trade.

I would again call your attention to the necessity of legislation relating to the subject of combinations in restraint of trade. The menace to the general prosperity of the state by the creation, and existence of monopolies is a matter of the gravest concern. Our aim should be not the destruction of large corporations, conducting large operations in a legitimate manner, but the suppression of those which are organized as monopolies and conducted in restraint of trade.

Our present statutes upon this subject are of little or no value as a remedy for existing conditions. The so-called anti-trust law of Wisconsin is contained in section 1791j to 1791m, inclusive, of our statutes. These sections apply only to corpora-

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tions organized under the laws of this state, taking no account of combinations of individuals and partnerships, or foreign corporations transacting business within the state. The act was passed in 1897, and even as to corporations of this state, it is of no value.

Section 1791j prohibits such corporations from entering into any conspiracy, trust, pool, agreement, or contract in restraint of trade.

The next section provides that whenever the Attorney General shall be notified or have reason to believe that any such corporation has violated any provision of the preceding section, he shall address inquiries to the officers thereof concerning the violation of such section, and it is made the duty of such officers to answer such inquiries under oath within sixty days.

Section 1791l provides that in case of the failure or neglect of such corporation or officers thereof to answer such inquiries, such failure or neglect is declared to be a forfeiture of the charter of such corporation, and it is made the duty of the Attorney General in such cases to enforce the forfeiture so declared.

The last section of the act relates solely to the testimony of witnesses. Nowhere in the act is any remedy given or penalty imposed for the illegal combination, but only for failure to answer inquiries. The entire act, therefore, when carefully examined, so far as affording any relief to the people, is a delusion, a shadow, without any substance.

The only other legislation we have upon this subject is that contained in sections 1747e to 1747h, inclusive, of the statutes. This act was passed in 1893 and there is grave danger that the entire act will be found unconstitutional by reason of the various exceptions from the operation of its provisions contained in section 1747h, and in addition the provisions of the act are very loosely drawn and of doubtful construction.

The pressing need for legislation upon this subject is forcibly brought to our attention by the fact that an action has been commenced by the United States government in the federal court charging that the "General Paper Company," a corporation organized under the laws of this state, and nineteen other Wisconsin corporations engaged in the manufacture of print paper, have entered into an illegal combination for the purpose of controlling the manufacture, prices and sales of such paper. At the request of the Executive, the Attorney General is at present engaged in

the investigation of these corporations, and will take such action thereon as the facts disclosed and our present statutes warrant.

But for the reasons above given, unless proper legislation is at once passed, it is doubtful if anything can be accomplished by the state authorities, and surely the state of Wisconsin should not permit this state to become a shelter for these great combinations so full of peril to us all.

In my judgment, there should be an entire revision of the laws relating to this subject and laws should be enacted for the prevention of illegal combinations within the state, whether they be corporations or otherwise, and to restrain the operations in this state by such combinations organized elsewhere.

I would recommend also that in addition to providing for the forfeiture of the charter of the offending corporation, or in the case of a foreign corporation the denial of its right to transact business in this state, severe penalties should be imposed upon the officers and agents of such corporations who are responsible for the violation of laws.

In both of my previous biennial messages I have recommended such legislation, but it has failed of passage. I trust that at this session the subject will receive such consideration as will result in proper legislation upon the subject at the earliest possible moment, whereby the executive officers of the state may have authority to take such measures as will effectually prevent such combinations in restraint of trade to the full extent of the constitutional powers of the state.

The Legislative Lobby.

I submit for your consideration the same recommendation heretofore made with respect to legislative lobbying.

Assembled in your representative capacity, every interest affected by legislation proposed or pending is entitled to be heard. Private citizen or public-service corporation, each should be afforded opportunity to lay before the legislature every fact and offer every argument. But the legislature should not be unmindful of the boast made in the railroad lobby two years ago, following the defeat of the railway taxation bills, that: "No bill has been enacted into law during the sixteen years last past in the interests of the people when objected to by the railroads," and at the outset should pass such a measure with respect to

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APPENDIX B: REPORTED WISCONSIN ANTITRUST LAW CASES, 1960-PRESENT*

Case Name	Line of Commerce	Parties from WI?	Interstate parties?	Case Summary
State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960).	Π-state Δ-foreign and domestic manufacturers of calcium chloride		X	Court held that the State could pursue action against defendants under Wis. Stat. Sec. 133.01 even though the FTC had previously filed a complaint because the federal government had not pre-empted state law in this field.
State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (1966).	Π-state Δ-MLB teams and league		X	Court reversed and remanded with directions to dismiss plaintiff's complaint because decisions made by baseball organizations regarding agreements and rules that provided for the structure of the organization were exempt from antitrust statutes.
Chapiewsky v. G. Heileman Brewing Co., 297 F.Supp. 33 (W.D.Wis. 1968).	Π-WI beer distributor Δ-WI beer brewer (principle office La Crosse, but court acknowledge interstate flow of beer)	X		Court denied all four grounds for defendant's motion to dismiss. Court held that the federal and state claims derived from a "common nucleus of operative fact" although there was not complete identity of facts, thus judicial power existed to hear the state claims.
Reese v. Associated Hosp.l Serv., Inc., 45 Wis. 2d 526, 173 N.W.2d 661 (1970).	Π-insurance agent including hospitalization coverage Δ-hospital service corporations, nonproprietary corporate hospitals		X	Court found that a discount was not an unreasonable restraint of trade under Wis. Stat. Sec. 133.01 because plaintiff's activities were within stated purpose of Wis. Stat. Sec. 182.032 and satisfied the rule of reason test. Court held that since challenged practice was within purposes of Wis. Stat. Sec. 182.032, claim should have arisen under Wis. Stat Ch. 297.
John Mohr & Sons, Inc. v. Jahnke, 55 Wis. 2d 402, 198 N.W.2d 363 (1972).	Π-WI employer and manufacturer of poultry packaging equipment Δ-employees of Π	X		Court affirmed denial of defendant's motion for new trial. Trial court found for plaintiff on their antitrust claim and granted treble damages and punitive damages. However, punitive damages were not allowed because treble damages were the only damages authorized by statute and court could not award double recovery.
Ammerman v. Bestline Products, Inc., 352 F.Supp. 1077 (E.D.Wis. 1973).	Δ-WI manufacturer of liquid cleaning products Π-WI distributors	X		Court denied motion to dismiss claim under Sherman Act and claim under Wis. Stat. Sec. 133.01. Court held that where distributors alleged that manufacturer misrepresented profit potential of their distributorships and that antitrust violations were part of reason profits were limited, issues of misrep. and antitrust charges were similar enough for federal court to assume pendent jurisdiction over the misrep. Allegation.

*We wish to acknowledge the efforts of Amanda Louise Lowerre and Jacob M. Chianelli in the research and preparation of this table.

Case Name	Line of Commerce	Parties from WI?	Interstate parties?	Case Summary
Roux Laboratories, Inc. v. Beauty Franchises, Inc., 60 Wis. 2d 427, 210 N.W.2d 441 (1973).	Π-Florida corporation engaged in merchandise distribution Δ-WI corporation engaged in operating a beauty shop		X	Court affirmed plaintiff's demurrer to counterclaim because no facts were alleged which show how those agreements operated to restrain price competition related to the goods defendant was selling. Court held that Wis. Stat. Sec. 133.26 was inapplicable because there was no illegal consideration involved and as to the counterclaim, Court found no facts alleged to show that the agreements operated to restrain price competition.
State v. B. R. Amon & Sons, Inc., 1974 WL 13777 (Wis. Cir. 1974).	Π-State Δ-construction companies and concrete paving companies	X		Court enjoins and restrains defendants pursuant to Wis. Stat. Sec. 133.01. Court hold that the complaint states a claim upon which relief may be granted against the defendants under Wis. Stat. Sec. 133.01.
State v. Hall, 65 Wis. 2d 18, 221 N.W.2d 806 (1974).	Δ-State Δ-mechanical contractors with principal office in Madison, WI	X		Defendants were indicted for allegedly conspiring to restrain competition in violation of Wis. Stat. Sec. 133.01 (1),(3). Court reversed and remanded order granting defendant respondent's motion to quash; order denying defendant petitioners' motion to dismiss or quash indictment on ground of statutory immunity was affirmed because statutory immunity as defense to prosecution could not be claimed; plaintiff state's motion to dismiss defendant respondent's cross appeal was granted; plaintiff state's motion to strike supplemental return filed was denied.
State ex rel. Nordell v. Kinney, 62 Wis. 2d 558, 215 N.W.2d 405 (1974).	Π-WI dairy farmer Δ-Milk producers Ass'n	X		Court affirmed change of venue. Court affirmed finding that because the action was one seeking to recover a penalty or forfeiture imposed by statute, Wis. Stat. Sec. 133.01, the proper venue was in the county where the cause of action arose.
City of Madison v. C.A. Hooper Co., 1975 WL 15942 (Wis. Cir. 1975).	Π-city and county Δ-WI plumbing and heating companies	X		Court applied Wis. Stat. Sec. 133.01 and overruled defendant's demurrers on all grounds.
State v. Ampex Corp., 1975 WL 154966 (Wis. Cir. 1975).	Π-State Δ- camera, video equipment and electronic suppliers		X	Court enjoined and restrains defendants pursuant to Wis. Stat. Sec. 133.01.
State v. Ass'n of Greater Milwaukee Roofing Contractors, Inc., 1975 WL 15507 (Wis. Cir. 1975).	Π-State Δ-Ass'n of roofers	X		Court enjoined and restrained defendants pursuant to Wis. Stat. Sec. 133.01.

Case Name	Line of Commerce	Parties from WI?	Interstate parties?	Case Summary
State v. Camera Corner, Inc., 1975 WL 15495 (Wis. Cir. 1975).	Π-State Δ-camera, video and electronic suppliers	X		Court enjoined and restrained defendants pursuant to Wis. Stat. Sec. 133.01.
State v. L. G. Arnold, Inc., 1975 WL 15494 (Wis. Cir. 1975).	Π-State Δ-Construction contractors	X		Court enjoined and restrained defendants pursuant to Wis. Stat. Sec. 133.01.
State v. Standridge, 1975 WL 15506 (Wis. Cir. 1975).	Π-State Δ-WI garbage hauler	X		Court dismissed defendant's motions to dismiss and ruled that indictment charging defendants with violating Wis. Stat. Sec. 133.01 would stand.
City of Madison v. Hyland, Hall & Co., 73 Wis. 2d 364, 243 N.W.2d 422 (1976).	Π-city and county Δ-WI construction contractors	X		Court held that plaintiffs city and county were "persons" with standing to seek treble damages under Wis. Stat. Sec. 133.0, 133.23.
Van Dyke Ford, Inc. v. Ford Motor Co., 399 F. Supp. 277 (E.D.Wis. 1977).	Π- WI car dealership, related individuals, and financial corporations Δ-Car manufacturer, sales corporation, two local banks and an auto parts and equipment dealer		X	Court granted the motion to dismiss as to all but one bank and defendant dealership entities under the Sherman Act and Wis. Stat. Sec. 133.01. Court found a conclusory statement, merely alleging a violation in the words of the statute, insufficient in the absence of any allegations of participation in a conspiracy or monopoly. In the absence of diversity, the pendent state law claims had to be dismissed. Court found allegations that one of the banks supplied false information to other lending institutions to preclude the dealership from securing funding was sufficient to allege participation in a conspiracy where plaintiffs further alleged a restraint of trade. Court held that specific identification of the parties to the activities alleged was required to enable defendants to plead intelligently.
Hauer v. Bankers Trust New York Corp., 425 F.Supp. 796 (E.D.Wis. 1978).	Π-WI shopping center developers and center lessees Δ-NY bank holding company		X	Court dismissed plaintiff's Wis. Stat. 133.01 claim holding that it was not brought within the time provided by the applicable statute of limitations, Wis. Stat. Sec. 893.21(1).

Case Name	Line of Commerce	Parties from WI?	Interstate parties?	Case Summary
North Central Dairymen's Co-op. v. Temkin, 88 Wis. 2d 122, 271 N.W.2d 890 (1978).	Π-WI corporation of dairy farmers and a corporation formed to lease and manage milk receiving facility in Hartford, WI Δ-owners and lessors of facility and a non-profit Iowa corporation.		X	Court affirmed lower court's denial of the stay because the federal and state actions did not involve the same parties and the same issues, and the federal court was not empowered to grant complete relief.
State v. Waste Mgmt. of Wisconsin, Inc., 81 Wis. 2d 555, 261 N.W.2d 147 (1978).	Π-State of WI Δ-WI participants in the garbage hauling industry	X		Court affirmed conviction of the defendant for conspiring to restrain trade. Court applied Wis. Stat. Sec. 133.01 and held that the "second sentence of the statue is but one non-exclusory example of conduct prohibited by the first sentence." Court further held that as under federal law, no overt act had to be shown to convict for conspiring to commit a per se illegal antitrust offense.
Suburban Beverages, Inc. v. Pabst Brewing Co., 462 F.Supp. 1301 (E.D.Wis.1978).	Π-WI beer distributor Δ-national beer brewer		X	Court denied plaintiff's motion for a preliminary injunction. With respect to plaintiff's Wis. Stat. Sec. 133.01 cause of action, Court explained, "to the extent that this court has found that defendant's actions are exempt from the federal antitrust laws, such labor law exemption also applies to shield defendant from plaintiff's cause of action based upon state antitrust law.." In so ruling, Court held that a restrain on territory was not per se invalid; rather, the issue was whether the limitation resulted in an unreasonable restraint of trade.
Open Pantry Food Marts, Inc. v. Falcone, 92 Wis. 2d 807, 286 N.W.2d 149 (1979).	Π-entered agreement to lease premises of grocery store Δ-entered agreement to operate grocery store under franchise agreement	X		Court reversed lower court's dismissal of antitrust counterclaim for recoupment of initial fees, building fees, and inventory deposit were not barred bar two-year limitation governing suits for treble damages.
Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co., 92 Wis. 2d 709, 285 N.W.2d 891 (1979).	Π-nursing home Ass'n and individual nursing homes Δ-newspaper refusing to run adds	X		Court found the allegations lack any facts establishing a contract, combination, or conspiracy.

Case Name	Line of Commerce	Parties from WI?	Interstate party?	Case Summary
Frank v. Kraft, Inc., 1980 WL 2001 (E.D.Wis. 1980).	Π-WI dairy hauler Δ-VA corporation		X	Court granted defendant's motion for summary judgment as to both counts in the complaint, and the action was dismissed. Court held that the alleged boycott was not prohibited by Wis. Stat. Sec. 133.
Grams v. Boss, 97 Wis. 2d 332, 294 N.W.2d 473 (1980).	Π-WI insurance agents Δ- WI insurance agents, all parties marketing hospital, health, and life insurance.	X		Lower court's grant of summary judgment was found to be in error because Wis. Stat. Sec. 133.01 applied to the facts of the allegation. Court explained: "[b]ecause the alleged activities of [the plaintiff] are not within and pursuant to the stated purpose of sec. 182.032, Stats. 1973, we conclude that Wis. Stat. Sec. 133.01, Stats. Is applicable to this complaint."
Independent Milk Producers Coop. v. Stoffel, 102 Wis. 2d 1, 298 N.W.2d 102 (1980)	Π-WI milk producers Δ-dairy farmers, milk transporter, and a competitor milk producer from IL		X	The court affirmed the judgment because there was no reversible error by the trial court, and there was sufficient credible evidence to support the jury verdict. Court held that the alleged conduct was "per se" illegal and adopted the "rule of reason" as the controlling standard.
Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164 (7th cir. 1981).	Π-WI distributor Δ-WI manufacturer	X		Court upheld preliminary injunction against defendant, holding that defendant had not shown a clear abuse of discretion, clearly erroneous findings, or mistake of law. Court explained that although retroactive application of Wis. Stat. Sec. 135.01 et seq. was prohibited, defendant failed to show it had not renewed the distributorship agreement when it acquired the company.
Amoco Oil Co. v. Cardinal Oil Co., 535 F. Supp. 661 (U.S. Dist. , 1982)	Π-national seller of petroleum products Δ-WI "jobber" of Π's products		X	Court granted plaintiff's motion for summary judgment on defendants Wis. Stat. Sec. 133.03 counterclaim because the alleged concerted action was between plaintiff and its employees.
Town of Hallie v. City of Chippewa Falls, 105 Wis.2d 533, 314 N.W.2d 321 (1982).	Π-town Δ-city	X		Court held such tie-in behavior by defendant was not illegal under state Wis. Stat. Sec. 133.01 and, therefore, plaintiff's complaint failed to state a cause of action. When dealing with actions by municipalities, Court held that the test as to applicability of state antitrust law was whether legislature intended to allow municipalities to undertake such actions.
Stepp v. Ford Motor Credit Co., 623 F. Supp. 583 (U.S. Dist. , 1985)	Π-majority stockholder and president of a WI Ford dealership		X	On defendant's motion for summary judgment, Court dismissed defendant's 15 U.S.C.S. Sec. 2 & Wis. Stat. Sec. 133.03 antitrust claims because plaintiff's factual allegations

	Δ- financing company			did not demonstrate he would prevail at trial.
Case Name	**Line of Commerce**	**Parties from WI?**	**Interstate parties?**	**Case Summary**
RTE Corp. v. Dow Corning Corp., 1986 WL 15395 (E.D.Wis.)	Π-WI manufacturer of dielectric fluids Δ-national manufacturer of dielectric fluids		X	Court declined to grant defendant's motion to dismiss. Citing *Heilman*, supra, Court was unwilling to dismiss plaintiff's claims at an early stage of litigation b/c of failure to allege specific instances of misconduct in WI.
Obstetrical & Gynecological Associates of Neenah, S.C. v. Landig, 129 Wis. 2d 362, 384 N.W.2d 719 (1986).	Π-WI customer Δ-WI interior decorator	X		Court reversed trial court because to prevail it was necessary to prove that secret rebate had an effect upon a competitor or competition.
Segall v. Hurwitz, 114 Wis. 2d 471, 339 N.W.2d 333 (1986).	Π-WI purchaser railroad salvage business Δ-WI seller of the railroad business and bank	X		Court determined Wis. Stat. Sec. 133.01 claim was barred because of the statute of limitation on the antitrust statutes.
Scott & Fetzer Co., Kirby Co. Div. v. Peterson, 1987 WL 110400 (W.D.Wis. 1987)	Π-Ohio Corp. manufacturing/distributing vacuum cleaners through independent distributors and dealers Δ-WI dealers		X	Court granted summary judgment against defendant on his counterclaims under the Sherman Act, 15 U.S.C.S. Sec. 1, and Wis Stat. Sec. 133.03. Court found that that defendant's dealership contract was terminated when the sublicensing distributor voluntarily terminated his dealership agreement, five years before the alleged conspiracy to fix prices. Moreover, there was no evidence of a price-fixing conspiracy. The actions of third-party defendants were the product of legitimate competitive activity and did not constitute a group boycott within the meaning of the antitrust laws. Defendant did not show a specific intent to monopolize because there was no evidence of predatory conduct.
Arena v. Lincoln Lutheran of Racine, Inc., 149 Wis. 2d 35, 437 N.W.2d 538 (1989)	Π-WI nursing supervisor Δ-WI nursing facility	X		Court affirmed granting of plaintiffs motion for summary judgment holding that National Labor Relations Act, 29 U.S.C. Sec. 1164(a), preempted plaintiff's Wis. Stat. Sec. 133.03 cause of action.
American Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc., 154 Wis. 2d 135, 452 N.W.2d 575 (1990).	Π-WI ambulance companies Δ-city of Milwaukee	X		Court reversed and remanded the lower court's decision, because it determined that the antitrust law manifestly indicated a legislative intent to subordinate the city's home-rule authority to its provisions and, therefore, plaintiffs' complaint stated a claim for relief.

Case Name	Line of Commerce	Parties from WI?	Interstate party?	Case Summary
Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 650, 529 N.W.2d 905 (1995).	Π-WI general building contractor Δ-WI lumber yard	X		Lower court's remittitur order was vacated because the jury's verdict was within range and represented compromise. Court held that the burden of proof in a civil antitrust action to be the lower civil burden of "reasonably certainty by evidence that is clear, satisfactory, and convincing," by examining the purpose and policies underlying antitrust law.
K-S Pharmacies, Inc. v. Abbott Laboratories, 1995 WL 1922010 (Wis. Cir. 1995).	Π-pharmacies Δ-manufacturers and wholesalers of pharmaceutical drugs		X	Court denied "motion to dismiss based on contention that the claim under Wis. Stat. Sec. 133.03 is interstate in nature."
Emergency One, Inc. v. Waterous Co., Inc., 23 F.Supp.2d 969 (E.D.Wis. 1998).	Π-FL manufacturer Δ-WI manufacturer and MN manufacturer		X	Court granted the defendants' motion to dismiss. In applying its "adverse effects" standard, Court held that the plaintiff's claims were not cognizable under Wisconsin antitrust law, not because they depicted predominantly interstate transactions, but because they had not alleged significant and adverse effects on economic competition in Wisconsin.
West Bend Elevator, Inc. v. Rhone-Poulenc S.A., 140 F.Supp.2d 963 (E.D.Wis. 2000).	Π-Wisconsin corporation Δ-non-Wisconsin corporation manufacturing methionine		X	Court complaint alleges chapter 133 violation and court denies plaintiff's motion to remove case back to state court because plaintiff could receive more than $75,000.
Heyde Cos. v. Dove Healthcare, L.L.C., 2001 WI App 278; 249 Wis. 2d 32, 637 N.W.2d 437 (2001)	Π-WI physical therapist provider Δ-WI nursing home provider	X		Court applied Wis. Stat. Sec. 133.03 in holding that a therapy services agreement between the parties was unenforceable. The provision that prevented the operator from hiring any of the provider's therapists for up to one year after the agreement expired unless they agreed in writing, was an unreasonable restraint of trade and thus void for public policy reasons.
In re Methionine Antitrust Litig., 2001 WL 679115 (N.D.Cal. 2001).	Π-indirect purchasers Δ-non-Wisconsin corporations manufacturing methionine		X	Court denied plaintiff's motion to dismiss on the grounds Wisconsin's Antitrust Statute did not reach conspiracies that are interstate in nature. "[T]he Court conclude[d], as did the *Emergency One* court, that Wisconsin's antitrust statutes reach interstate conspiracies with significant adverse effects in Wisconsin."

Case Name	Line of Commerce	Parties from WI?	Interstate party?	Case Summary
In re Terazosin Hydrochloride Antitrust Litig., 160 F.Supp.2d 1365 (S.D.Fla. 2001).	Π-indirect purchasers Δ-interstate manufacturers		X	Court denied the defendants' motion to dismiss. Court explained that recent cases from Wisconsin state courts support the view that Wis. Stat. Sec. 133.01 prohibits entities from conspiring across state lines to restrain trade within Wisconsin.
Conley Pub. Group, Ltd. v. Journal Communications, Inc., 2003 WI 119, 265 Wis. 2d 128, 665 N.W.2d 879.	Π-WI newspaper Δ-WI newspaper	X		Court affirmed summary judgment for the defendants. Court adopted the United States Supreme Court's Brooke Group test for assessing predatory pricing pursuant to Wis. Stat. Sec. 133.01 and held as a matter of law that the conclusions of plaintiff's expert could not support a jury verdict.

Totals			
Number of cases surveyed	Number of cases exclusively involving WI parties	Cases with at least one interstate party	Percentage of cases with at least one interstate party
45	26	20	44.44%

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June 17, 2004

Cornelia G. Clark,
Clerk, Wisconsin Supreme Court
110 E. Main St., # 215
Madison, WI 53701-1688

Re: *Olstad v. Microsoft Corporation*
Case No. 03-1086

Dear Ms. Clark:

There is a typographical error in the Amicus Brief of the University of Wisconsin Law School Consumer Law Litigation Clinic, Professor Peter C. Carstensen of the University Law School and Susan LaCava, Esq.

"Wisconsin" should be inserted before "conspiracy" on page 9 in the second line from the bottom.

We apologize for any difficulties this error may cause the Court.

Sincerely,
Susan LaCava, SC

Susan LaCava
CC: All Counsel of Record

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CLERK OF SUPREME COURT
OF WISCONSIN

SUPREME COURT OF WISCONSIN

GENE OLSTAD,
individually and on behalf of all
others similarly situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100 inclusive,

Defendants-Respondents.

Appeal No. 03-1086
Trial Court
Case No. 00CV3042

Appeal from the Circuit Court for Milwaukee County
The Honorable Jeffrey Kremers Presiding

BRIEF OF DEFENDANT-RESPONDENT MICROSOFT CORPORATION IN REPLY TO NONPARTY BRIEFS

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September 1, 2004

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ARGUMENT

I. The "Plain Language" of Wisconsin's Antitrust Statute Does Not Require Reversal.

Several amici argue that the plain language of Wisconsin's antitrust statute conclusively establishes that it is not limited to intrastate transactions.[1] The argument goes too far. As even the State concedes, "[t]he reach of the Wisconsin antitrust statute cannot be limitless," yet its plain language contains no limit. State Br. at 7. Thus, the literalistic approach urged by the amici would lead to the improbable result that the statute would reach conduct *anywhere* in the world, even if it had *no* impact whatsoever in Wisconsin. As the State acknowledges, this Court's recent decision in *State ex rel. Kalal v. The Circuit Court for Dane County*, 2004 WI 58, ___ Wis. 2d ___, 681 N.W. 2d 110

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[1] *See* Brief of State of Wisconsin ("State") at 7; Brief of The University of Wisconsin Law School Consumer Law Litigation Clinic ("Law Clinic") at 1-2; and Brief of Wisconsin Farm Bureau Federation, Cooperative, Wisconsin Federation of Cooperatives and Wisconsin Agri-Service Association ("Agriculture Associations") at 4-5.

(2004) confirms that statutory construction must "avoid absurd or unreasonable results" like this. State Br. at 2.

State ex rel. Kalal further confirms that to avoid "absurd or unreasonable results," context must be considered since "[c]ontext is important to meaning." *State ex rel. Kalal*, 2004 WI at ¶ 46. Context includes applicable constitutional limitations, since statutes must be interpreted to avoid constitutional infirmities. *State v. Conta*, 71 Wis. 2d 662, 689, 239 N.W.2d 313, 332 (1977); *Madison Metropolitan Sewerage District v. Department of Natural Resources*, 63 Wis. 2d 175, 185, 216 N.W.2d 533, 538 (1974) .

Mindful of these principles of statutory construction and of the then-existing Commerce Clause jurisprudence, this Court held in *Pulp Wood* that Wisconsin's statute reaches only intrastate transactions, an interpretation that this Court has confirmed repeatedly, both before and after the 1980 reenactment of the statute, and as recently as 2003 in *Conley*

Publishing. The "plain language" of our antitrust statute is the same today as it was last year, when this Court said: "The dearth of state antitrust precedent is not surprising because **the scope of Chapter 133 is limited to intrastate transactions**." *Conley Publishing Group Ltd. v. Journal Communications, Inc.*, 2003 WI 119, ¶16, 665 N.W. 2d 879, 885 (2003) (emphasis added).

Furthermore, contrary to the State's argument (Br. at 6), this Court's longstanding interpretation of the limited reach of Wisconsin's antitrust statute is in no way contradicted by Wis. Stat. § 165.065(2). That statute does not confer authority on the Wisconsin Attorney General to prosecute out-of-state anticompetitive activity involving interstate commerce. Rather, the statute merely authorizes the Attorney General to *cooperate with* those arms of the federal government that do have authority to prosecute such anticompetitive activity, namely the Antitrust Division of the

U.S. Department of Justice and the Federal Trade Commission. Section 165.065(2) confirms that the reach of Wisconsin's antitrust statute is more limited than that of the federal antitrust laws.

II. *Pulp Wood* And Its Progeny Are Controlling.

In an effort to avoid *Pulp Wood* and its progeny, various amici urge a number of arguments, some of which are at odds with each other and none of which has any merit.

A. *Pulp Wood* did not hold that either the federal statute or state statue could be applied.

The Agriculture Associations argue (Br. at 6) that the *Pulp Wood* decisions imply that, though the challenged conduct involved interstate commerce, either the state statute or the federal statute could be applied. Not so. *Pulp Wood I* was clear: "[The Wisconsin antitrust statute] is a copy of the federal statute, except that it applies to attempts to monopolize trade and commerce *within the state*. . . ." and

"[t]he contract we think involved *interstate* commerce, and *if so the federal statute is applicable.*" *Pulp Wood I*, 157 Wis. at 615, 625 (emphasis added). Then when the case returned after remand, *Pulp Wood II* reaffirmed those "principles of law. . .laid down" in *Pulp Wood I*: "The contract in question involved *interstate commerce*, and *hence* the federal statute is *the* statute to be applied to the case. . . ." *Pulp Wood II*, 168 Wis. at 404 (emphasis added).

B. The Commerce Clause jurisprudence of the late 19th century and early 20th century confirms that the trial court read *Pulp Wood* correctly.

The State (Br. at 3) and the Law Clinic (Br. at 3) attempt to diminish *Pulp Wood* by dismissing it as a relic "from a bygone era of Commerce Clause jurisprudence." But as a different group of amici, the Agriculture Associations, acknowledge, that historical fact actually supports the circuit

court's decision, since during that "bygone era" of "dual sovereignty" jurisprudence

> courts and many commentators adopted a rather facile distinction between the proper jurisdictional limits of federal and state antitrust law. Federal law applied to restraints that were 'in or affecting' interstate commerce. State law, on the other hand, applied to purely 'local' restraints."

Agriculture Assn. Br. 7.

Moreover, a key passage in the legislative history appended to the Law Clinic's own brief confirms that Wisconsin lawmakers of this era adhered to this "dual sovereignty" doctrine, and thus understood that only federal law could reach matters involving interstate commerce. Specifically, in urging the Wisconsin Legislature to expand one provision of the Wisconsin antitrust laws to reach foreign corporations, the Governor in 1901 wrote that while he thought Wisconsin should be able to have "some control over

the business transactions" *within Wisconsin* of foreign corporations, it was "of course known" that Wisconsin could not regulate such corporations' *interstate commerce* operations, since that arena was the exclusive bailiwick of the federal government:

> In the next place, [Chapter 357 of the General Laws of 1897] only denounces such combinations when entered into by corporations organized under the laws of this State. *It is of course known that the whole subject of interstate commerce is under our system exclusively a matter of Federal cognizance; but surely the State has some control over the business transactions within its limits, even by foreign corporations.*

State of Wisconsin, Assembly Journal, 45th Sess. 47 (1901) (Law Clinic Appendix at A-2) (emphasis added).

This legislative history further demonstrates that the Law Clinic is wrong in its assertion that "[t]he statutory background of Wis. Stat. § 133.12 shows its purpose is to

reach out-of-state conduct."[2] (Law Clinic Br. at 4) Instead, it confirms that when § 133.12 -- then Chapter 357 of the General Laws of 1897 -- was amended to reach foreign corporations, lawmakers understood and intended that the statute could not reach the activities of such corporations in interstate commerce, but only their activities here in Wisconsin. And contrary to the Law Clinic's suggestion, *State v. Golden Guernsey Dairy Coop*, 257 Wis. 254, 43 N.W.2d 31 (1950) does not interpret § 133.12 as reaching out-of-state conduct involving interstate commerce. Golden Guernsey never was charged with any such conduct. Rather, its Wisconsin license was revoked *solely because of what it*

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[2] The Law Clinic details a number of other provisions added to Wisconsin's antitrust act over the years and argues that their enactment somehow evinces a legislative intent to extend the territorial reach of the act's basic prohibitions. (Law Clinic Br. at 7-8) Not so.

Since *Pulp Wood I* held in 1914 that the act did not reach interstate commerce and *Pulp Wood II* confirmed that holding in 1919, the only way for the Legislature thereafter to extend the act's reach to interstate commerce was to enact new language expressly overruling *Pulp Wood*. The Legislature never did that in adopting any of the provisions listed in the Law Clinic's brief.

did in Wisconsin, namely conspired with others to "charge uniform and non-competitive retail and wholesale prices for the fluid milk sold by them *in Milwaukee County, Wisconsin*." *Golden Guernsey*, 257 Wis. at 258 (emphasis added).[3]

That Wisconsin lawmakers were well aware of the Commerce Clause jurisprudence of the day when they revised Chapter 357 in 1905 confirms that this Court in *Pulp Wood* correctly held that the Sherman Act applied to restraints "in or affecting" interstate commerce, while the Wisconsin statute applied only to "purely local restraints" -- *i.e.*, to "intrastate transactions."

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[3] *Golden Guernsey* does nicely illustrate that, contrary to the amici's claims, Wisconsin's *Illinois Brick* repealer is not a dead letter. The Milwaukee milk consumers, who in that case bought their milk from grocery stores that bought the milk at inflated prices from the conspirators, would have an indirect purchaser claim for damages against the conspirators.

C. Though Commerce Clause jurisprudence has changed, *Pulp Wood* remains binding .

Since Commerce Clause jurisprudence of the era of the statute's enactment compels affirmance of the trial court, the Agriculture Associations (Br. at 7-8) and the Law Clinic (Br. at 3) argue that the statute must now be reinterpreted using current Commerce Clause jurisprudence and *Pulp Wood* must be rejected. They are wrong.[4]

As a federal court recently held in interpreting a similar Mississippi statute enacted in 1900, the issue "is not whether today the State of Mississippi could constitutionally enact legislation that prohibits interstate anticompetitive conduct," but rather "whether the Legislature intended to do so when it enacted the" state's antitrust act. *In re Microsoft*

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[4] The Law Clinic appears to suggest that *State v. Pitsch*, 124 Wis. 2d 628, 369 N.W.2d 711 (1985) and *WKBH Television v. Wisconsin Department of Revenue*, 75 Wis. 2d 557, 250 N.W.2d 290 (1977) hold that the current interpretation of the constitution must be employed in interpreting a statute, rather than the interpretation of the constitution that prevailed at the time the statute was enacted. Neither case holds any such thing. Indeed, neither case even hints that such an issue was before the Court.

Corp. Antitrust Litigation, MDL No. 1332, 2003 WL 22070561, *2 (D. Md. Aug. 22, 2003) (emphasis added). Similarly, as the Alabama Supreme Court recently held in interpreting Alabama's antitrust statute of the same era, only the Legislature now can expand the statute's reach beyond intrastate activities. *Archer Daniels Midland Co. v. Seven-up Bottling Co.*, 746 So. 2d 966, 989-90 (Ala. 1999).

Ignoring these principles, the State continues to argue (Br. at 4-5) that this Court turned its back on *Pulp Wood* in two cases decided in the 1960s, *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 298, 101 N.W. 2d 133 (1960) and *State v. Milwaukee Braves, Inc.*, 31 Wis. 3d 699, 144 N. W. 2d 1 (1966). Microsoft explained in its earlier brief (Br. at 26-30) why those two cases do not in any way upset *Pulp Wood*. We would simply add here that *Allied Chemical* and *Milwaukee Braves* have in fact been cited by courts as *confirming* the rule of *Pulp Wood*. *See John Mohr & Sons, Inc. v. Jahnke*, 55

Wis. 2d 402, 410, 198 N. W. 2d 363 (1972) (citing *Milwaukee Braves* for the proposition that Wisconsin's antitrust law "applies to intrastate as opposed to interstate transactions"); *RTE Corp. v. Dow Corning Corp.*, 1986 WL 15395, *3 (E.D. Wis. 1986) (citing *Allied Chemical* for the proposition that "Wisconsin's antitrust statutes apply to intrastate transactions).

And, contrary to the Agriculture Associations' assertion (Br. at 12), the Wisconsin Legislature did nothing in its 1980 reenactment of the Wisconsin statute to extend the statute's reach to out-of-state conduct involved in interstate commerce. Significantly, as Olstad and all of the amici concede by their silence, the legislative history of the 1980 reenactment does not even mention *Pulp Wood* or any of its progeny, let alone state an intention to overrule *Pulp Wood*'s long-standing and often confirmed interpretation of the statute's reach.

Contrary to the suggestion of the Agricultural Associations (Br. at 12), deleting the words "in this state" was not intended to expand the statute's reach. To the contrary, as another amicus, The American Antitrust Institute ("Institute"), readily concedes (Br. 5) and as Judge Adelman detailed in *Emergency One*, the phrase "in this state" did not even function grammatically in the pre-1980 statute to limit the statute's reach to intrastate transactions. Rather, the phrase merely confirmed the obvious: to qualify for possible regulation by the Wisconsin statute, the activity in question must at least "adversely affect" Wisconsin commerce. *Emergency One v. Waterous Co., Inc.*, 23 F. Supp. 2d 959, 964 (E.D. Wis. 1998). As Judge Adelman explained, a review of the entire legislative history "fails to disclose a single reference to a conscious design to significantly expand" the statute's reach "by deleting the words 'in this state' from §133.03." *Id.* He noted the "more plausible

explanation for the disappearance of this phrase is that, like fully two-thirds of the language in §133.03 prior to revision, the words were excised as non-essential or redundant." *Id.* In sum, "in this state" was deleted simply because it was not needed to make the obvious point that an activity must have some adverse effect on Wisconsin commerce to have even a chance of being regulated.

That the language of the reenacted statute evinces no intention to expand the statute's reach is dispositive. As the Agriculture Associations expressly acknowledge (Br. at 12) and all the other amici and Olstad concede by their silence, when "the Legislature substantially reenacts a statute," it is presumed, absent express language to the contrary, to "adopt[] [the] construction previously placed on the statute..." and therefore the statute must continue to be "interpret[ed] ... consistent with case law predating ..." its reenactment. *Tucker v. Marcus*, 142 Wis. 2d 425, 434, 418

N.W. 2d 818, 821 (1988); *see also Bruner v. Wisconsin Department of Revenue*, 57 Wis. 2d 70, 76, 203 N.W.2d 663, 666 (1973) ("the mere repeal and reenactment of substantially the same [statute] does not overrule the prior court interpretations"); *Hansen v. Hansen*, 176 Wis. 2d 327, 335, 500 N.W.2d 357, 361 (Ct. App. 1993) ("[w]hen drafting [the statute] in substantially the same form as the prior statutes, it is presumed that the Legislature adopted the judicial interpretation of the prior statutes"). Thus, after its substantial reenactment in 1980, it was necessary to continue interpreting the Wisconsin statute consistent with *Pulp Wood* and its pre-1980 progeny. And that is exactly what this Court did in its post-1980 decisions in *Grams, American Medical Transport*, and *Conley Publishing* -- and should also do now.[5]

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[5] In its earlier brief, Microsoft offered a public policy reason why the Legislature might have chosen not to overturn the *Pulp Wood* rule, namely that doing so would expose defendants like Microsoft to multiple recovery as direct purchasers sue in federal court and indirect purchasers sue -- for the same damages -- in state court. (cont.)

D. *Pulp Wood*'s holding is a binding judicial act, not *dicta*.

The State (Br. at 3) and the Agriculture Associations (Br. at 5) argue that the Court's pronouncements in *Pulp Wood* were *dicta* because they were not decisive of the controversy and, therefore, are not binding and can be ignored.[6] They are wrong.

Though the Court's holding in *Pulp Wood* was not decisive of the controversy before the Court, the Court unquestionably took up and discussed the issue of whether the Sherman Act or the Wisconsin statute applied, decided the Wisconsin statute reached only intrastate transactions, and

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Fn. 5 (cont.) Brief of Defendant-Respondent at 35 n. 5. The Wisconsin Counties Association (Br. at 11 n. 2) claims that this possibility is "remote" because no direct purchasers have sued Microsoft. In fact, Judge Motz certified a class of direct purchasers last year in the federal multi-district litigation. *In re Microsoft Antitrust Litigation*, 214 F.R.D. 371, 377-78 (D. Md. 2003).

[6] Notably, even the Attorney General concedes (State Br. at 5, n. 1) that Judge Warren, who himself was Wisconsin's Attorney General before taking the bench, applied *Pulp Wood*'s principles to decide the controversy before him in *Maryland Staffing Services, Inc. v. Manpower, Inc.*, 936 F. Supp. 1494, 1504-05 (E.D. Wis. 1996).

therefore decided that, since the challenge conduct involved interstate commerce, the Sherman Act applied. Having intentionally taken up and decided the issue, Wisconsin law is clear: the Court's pronouncements are not *dicta*; they constitute judicial acts that remain binding today:

> [W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy [before it], *such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.*

Gillen v. City of Neenah, 219 Wis. 2d 806, 825 n. 11, 580 N.W.2d 628, 635 n.11 (1998) (emphasis added); s*ee also* *Wagner v. Milwaukee County Election Commission*, 263 Wis. 2d 709, 749, 766 N.W.2d 816, 837 (2003); *Chase v. American Cartage Co.*, 176 Wis. 235, 238, 186 N.W.2d 598, 598-99 (1922); *State v. Rodriguez*, 221 Wis. 2d 487, 496-97,

585 N.W.2d 701, 705 (Ct. App. 1998); *State v. Taylor*, 205 Wis. 2d 664, 670, 556 N.W.2d 779, 782 (Ct. App. 1996).

E. *Pulp Wood* demonstrates that an adverse impact on Wisconsin commerce is not sufficient to subject out-of-state acts involving interstate commerce to Wisconsin's statute.

Trying to escape *Pulp Wood*'s holding, the Institute argues that the Court invoked the Sherman Act, rather than the Wisconsin statute, in condemning the interstate conspiracy to drive down pulp wood prices because, according to the Institute, the Court found that "the anticompetitive harms . . . caused were to be found primarily in Northern Michigan" and the conspiracy had only a "secondary" and not "appreciable" impact in Wisconsin. Institute Br. at 3-4. The Institute speculates that the Court might well have invoked the Wisconsin statute, rather than the Sherman Act, had there been direct and more

"appreciable" harm in Wisconsin -- and less harm in Northern Michigan. *Id.*

This argument finds absolutely no support in either the facts recited by the Court or in the language of the Court's holding. To be sure, the Institute is correct that the illegal conduct at issue in *Pulp Wood* was the formation and successful execution of a buyers' cartel by paper mills and their purchasing agents. The cartel presented a united bargaining front to the suppliers of pulp wood so as to drive down the price the mills had to pay for pulp wood. The cartel unquestionably operated in interstate commerce; as the Court found, the contract at issue "involved interstate commerce" because the plaintiff, a cartel member, purchased its wood "from the States of Wisconsin, Minnesota, and Michigan, and the dominion of Canada." *Pulp Wood I*, 157 Wis. at 1061-1062.

But, contrary to the Institute's argument, the Court did not find that the adverse effects of the cartel were primarily felt in Northern Michigan -- and only secondarily and unappreciably in Wisconsin. The Court did discuss an arrangement the cartel made in Northern Michigan with the White Marble Lime Company to act as the exclusive agent of the cartel in that area so that the pulp wood suppliers in that region had no choice but to sell at the cartel's price. *Pulp Wood II*, 168 Wis. at 234. However, the Court described similar arrangements by the cartel, with similar effect, in Door County, Wisconsin and Crandon, Wisconsin:

> In Door County, Wis., a contract similar to that made with the Lime Company in Michigan was made with one Le Mer, giving him exclusive rights in that county, and another instance appears of the making of such an arrangement at Crandon, Wis....

Id. Further, the Court expressly found that the cartel's actions also negatively affected Wisconsin pulp wood suppliers

operating in the immediate vicinity of the paper mills in the Fox River Valley and Wisconsin River Valley. *Id.*

Contrary to the Institute's argument, the Court never quantified the relative harms to suppliers in Northern Michigan and Wisconsin -- or the other areas impacted by the cartel, namely Minnesota and Canada. Since the Court never even ventured such a quantification, it plainly did not base its determination to apply the Sherman Act on a finding that the harm in Wisconsin had been "secondary" and not "appreciable." Instead, the Court simply held that because the cartel operated in interstate commerce, the Sherman Act -- not the Wisconsin statute -- applied. *Pulp Wood II*, 168 Wis. at 232.

And so the facts underlying *Pulp Wood* actually further confirm that the Wisconsin statute cannot be applied merely because Microsoft's out-of-state activities are alleged to have adversely affected Wisconsin commerce. The *Pulp*

Wood buyers' cartel was found by the Court to have adversely affected Wisconsin commerce, yet the Court nonetheless held that only the federal act applied.

CONCLUSION

The amici argue that a reversal is required because, even when coupled with the stiff penalties and broad remedies available under the federal law, the Wisconsin act, as interpreted in *Pulp Wood*, is inadequate to protect Wisconsinites. They argue equally strenuously in dismissing the policy considerations advanced by Microsoft for not extending the statute's reach. But they are arguing to the wrong audience.

Wisconsin law is clear. Since this Court has already spoken repeatedly, in *Pulp Wood* and its progeny, only the Wisconsin Legislature can now decide whether policy considerations merit overruling those decisions. And even the amici concede that if *Pulp Wood* and its progeny are to be

overruled, there are policy issues that must be weighed and evaluated in formulating a new standard to be applied. *See, e.g.* State Br. at 7-10. But again, this is an exercise for the Legislature, not this Court.

The trial court's decision must be affirmed.

September 1, 2004.

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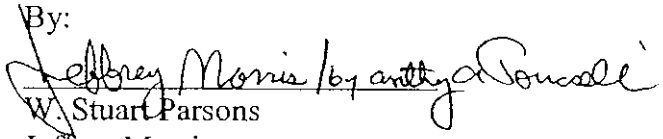
By: 

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b).

The length of this brief is 3567 words.

Dated this 1st day of September, 2004.

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03-1086

WISCONSIN COURT OF APPEALS
DISTRICT I

GENE L. OLSTAD,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

vs. Appeal No. 03-1086

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100, inclusive,

Defendants ~~Appellees.~~ RESPONDENTS

Appeal taken from the Final Order of the Milwaukee County Circuit Court
The Honorable Jeffrey Kremers, Presiding
Circuit Court Case No. 00-CV-003042

BRIEF AND REQUIRED SHORT APPENDIX OF
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STATEMENT OF ISSUES

1. Does the plain language of Wisconsin's amended antitrust statute limit its application to wholly intrastate commerce?

   Answered by the trial court: Yes.

2. Does Wisconsin Supreme Court precedent limit application of Wisconsin's antitrust statute to wholly intrastate commerce?

   Answered by the trial court: Yes.

3. As a result of the Federal Court's finding that Microsoft has violated Wisconsin's antitrust statute, is Microsoft collaterally estopped from arguing here that Wisconsin's antitrust statute does not apply to its conduct.

   Answered by the trial court: Not Answered by the trial court.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument should be heard by the Court because the Court's decision in this case will have significant public policy ramifications. Oral argument should be heard because it would more fully develop the issue and its effects on Wisconsin consumers.

The decision of the Court should be published. The issue in this case applies an established rule of law to a factual situation significantly different than that in published opinions and resolves a conflict between prior decisions.

STATEMENT OF THE CASE

Plaintiff, Gene L. Olstad ("Olstad"), brought this case as a class action against Defendant Microsoft for damages caused by Microsoft's practices in preventing and destroying competition and maintaining monopoly power within the State of Wisconsin. (R. 68 at ¶ 16.) Microsoft charged prices in Wisconsin for Intel-compatible Microsoft operating systems, Word applications software, Excel applications software, and Office Suite software licenses that were substantially above that which could be charged in a competitive market. (R.68 at ¶¶ 8, 16, 52, 58, 61.) Microsoft sold its products and distributed licenses to hundreds of thousands of consumers in Wisconsin and conducted extensive advertising and sales activities within Wisconsin. (R.74 at p. 2.) End-users such as Olstad and members of the putative class ("Class") were the foreseeable victims of Microsoft's anticompetitive conduct and have paid artificially inflated prices for Microsoft's software licenses. (R.68 at ¶ 66.) The purchases are in Wisconsin and as such are intrastate transactions.

This action was premised on the findings and conclusions made by the District Court for the District of Columbia in the case *United States v. Microsoft*. *See United States v. Microsoft*, 84 F. Supp. 2d 9 (D.D.C. 1999) ("Findings of Fact"), and *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000) ("Conclusions of Law"). In that proceeding, Judge Jackson specifically found that Microsoft violated Chapter 133 of the Wisconsin statutes. *Id.* at 56. This action sought to recover the damages suffered by Wisconsin consumers as a result of Microsoft's anticompetitive conduct as established in the Federal Action.

Microsoft moved for summary judgment on the grounds that, *inter alia*, Wisconsin's antitrust statute did not apply to Microsoft's interstate commercial activities. (R.71)

Microsoft argued that, because it is involved in interstate commerce versus intrastate commerce, the claims of Wisconsin's citizens for damages caused by Microsoft's monopolistic conduct in the licensing and distribution of Microsoft products within this state are precluded under Wisconsin's antitrust statute, Wis. Stats. Ch. 133. (R.72 at pp. 5-8.) The trial court did not recognize that the purchases in Wisconsin are intrastate transactions. Following a hearing on January 13, 2003 (R.88;App.2-20), the trial court granted Microsoft's motion for summary judgment in an Order dated January 21, 2003. (R.83;App.1) Plaintiff filed its Notice of Appeal from that final Order on April 18, 2003. (R.86)

ARGUMENT

I. TRIAL COURT SHOULD HAVE CONSIDERED WHETHER THE PLAIN LANGUAGE OF WISCONSIN'S AMENDED ANTITRUST STATUTE LIMITS ITS APPLCATION TO WHOLLY INTRASTATE COMMERCE.

The issue raised by Microsoft's motion for summary judgment was whether Wis. Stats. § 133.03(2) was limited in its application to wholly intrastate commerce.[1] This is an issue of statutory construction. Unfortunately, the trial court did not engage in statutory interpretation, but instead engaged in an exercise of trying to interpret the holding of the *Pulp Wood* case. The effect of the trial court's decision is to hold that Wisconsin's antitrust statutes do not protect Wisconsin citizens against monopolies that have any interstate aspect. In today's economic reality, that would leave no protection for Wisconsin consumers and

[1] Plaintiff brings this case under Wis.Stats. § 133.18, which provides that "any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. " Microsoft is alleged to have violated § 133.03(2), and so it is the meaning of that section that is critical to the scope of the remedy afforded.

is contrary to the clear, ordinary, and accepted meaning of Wis. Stats. Ch. 133. Thus, the trial court's analysis of the issue is fundamentally flawed.

The role of the courts in construing statutes is well established:

> The ultimate goal of statutory interpretation is to ascertain the intent of the legislature. The first step of this process is to look at the language of the statute. If the plain meaning of the statute is clear, a court need not look to rules of statutory construction or other extrinsic aids. Instead, a court should simply apply the clear meaning of the statute to the facts before it. If, however, the statute is ambiguous, this court must look beyond the statute's language and examine the scope, history, context, subject matter, and purpose of the statute.

UFE, Inc. v. LIRC, 201 Wis.2d 274, 281-82, 548 N.W.2d 57 (1996) (citations omitted).

Where the "the language of the statute is unambiguous, 'resort to matters outside the statute, such as legislative history to interpret it, is not necessary nor permissible.'" Rather, the court must give effect to the ordinary and accepted meaning of the language." *County of Walworth v. Spalding*, 111 Wis.2d 19, 24, 329 N.W.2d 925, 927 (1983) (citations omitted).

The language of Wis.Stats. § 133.03(2) is clear on its face. In relevant part, it states:

> Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony...

There is nothing in the language of the statute itself that creates even a suggestion that the legislature intended to limit its application to wholly intrastate commerce. The statute prohibits any effort to monopolize any part of trade or commerce within Wisconsin. The statute does not require that the effort to monopolize must have originated within the state, or must have been exclusively conducted within the state. On its face, the statute would prohibit any effort by an interstate commercial enterprise, such as Microsoft, to monopolize

a market within this state. That is precisely what the Plaintiff has alleged about Microsoft's conduct and what the court in the Federal Action has already determined that Microsoft did. See *United States v. Microsoft,* 84 F.Supp.2d 9 (D.D.C. 1999). Plaintiff's purchase, as with the purchases of the other putative class members, was an intrastate transaction.

Rather than examine the plain language of the statute, however, the trial court relied solely upon *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), a case decided 66 years before Wis. Stats. Ch. 133 was amended in 1980, as the basis for deciding that the statute was limited to wholly intrastate commerce. First,*Pulp Wood* did not hold what Microsoft claimed, and yet the trial court accepted Microsoft's flawed claim. That was not the proper focus for deciding the issue. The trial court's decision is wrong.

It may be that the trial court was persuaded by Microsoft's argument because the legislative history of the amended statute did not specifically mention *Pulp Wood*, the statute should be construed as having accepted *Pulp Wood*'s limitation on its application. There are several problems with such an argument. First, it goes outside the language of the statute to create an ambiguity where none otherwise exists. As pointed out above, that is not the proper analysis in determining the meaning of the statute. Moreover, it is premised on a faulty assumption, *i.e.*, that *Pulp Wood,* in fact, limits the application of the statute to wholly intrastate commerce. While Plaintiff believes that the language of the statute is sufficiently clear to establish the legislature's intent, the next sections of the brief examine those matters outside the statute in the event the Court determines there is an ambiguity to be resolved.

II. EVEN IF THE COURT EXAMINES MATTERS EXTRANEOUS TO THE TEXT OF THE STATUTE, IT IS CLEAR THE LEGISLATURE DID NOT INTEND TO LIMIT THE STATUTE'S PROTECTION OF WISCONSIN'S CITIZENS TO WHOLLY INTRASTATE COMMERCE.

If the Court perceives some ambiguity in the statute, then resort may be made to "the scope, history, context, subject matter, and purpose of the statute." *UFE Inc.*, 201 Wis.2d at 282. It is clear from an examination of the history of amendments to Ch. 133 that the legislature intended to extend remedies to Wisconsin consumers injured by monopolies operating in this state, regardless of whether those monopolies are interstate or intrastate commercial enterprises. Wisconsin has an interest in and right to protect its citizens and the integrity of its commerce. That is what Ch. 133 does.

A. The Legislative History Of The 1980 Amendments Suggests That The Legislature Intended The Statute To Extend To Interstate Commerce That Affected The Citizens Of This State.

In 1980, Wisconsin's legislature extensively revised the antitrust statutes. In the *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F.Supp.2d 959 (E.D. Wis. 1998), Judge Adelman noted that Wisconsin courts had not directly considered whether the 1980 amendments to Chapter 133 applied to interstate commerce. Thus, he conducted a thorough review and analysis of existing precedent and the legislative history of Wisconsin's amended antitrust statute, concluding that Chapter 133 would apply to interstate conduct in some situations.[2]

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[2] While not binding precedent, the *Emergency One* decision has been hailed and/or followed in several other cases and authorities. *See e.g. In re Cardizem CD Antitrust Litigation,* 105 F.Supp.2d 618. 666 (E.D.Mich. 2000) (applying Wisconsin antitrust statute, court followed *Emergency One* as persuasive authority for the proposition that amended statute applies to interstate commerce); *In re Methionine Antitrust Litigation,* 2001 WL 679115, 4-5 (N.D. Cal. 2001) (applying Wisconsin's antitrust statute, court found Judge Adelman's analysis very persuasive for applying amended statute to interstate commerce); *In re Microsoft Antitrust Litigation*, 2001 WL 1711517, p. 3-4 (Me.Supr, March 26, 2001) (reciting finding that the inclusion of relief for indirect purchasers to address *Illinois Brick* was best indication that Wisconsin legislators intended to hold interstate actors accountable in certain situations); *Comes v. Microsoft*

Judge Adelman found that one of the strongest indications that the legislature intended the amended statute to apply to interstate commerce was the fact that it included indirect purchaser claims. *Emergency One,* 23 F. Supp.2d at 964. The inclusion of indirect purchaser claims was a direct response to the U.S. Supreme Court ruling in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), which precluded indirect purchasers, such as the Plaintiff here, from asserting claims under the Sherman Act. *Emergency One,* 23 F. Supp.2d at 964; *see also California v. ARC America Corp.,* 490 U.S. 93, 98, n.3, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989).

In his extensive review of the Legislative history behind the 1980 amendments, [3] Judge Adelman noted the numerous references to *Illinois Brick* in those materials, concluding that the 1980 amendments were meant to replace the lost federal cause of action with a right for consumers to pursue indirect claims under Wis. Stats. Ch. 133. Judge Adelman found that by legislatively repealing *Illinois Brick,* Wisconsin assured that indirect purchasers within its borders would continue to have a remedy under state law. In so doing, the 1980 amendments "clearly assume that Chapter 133 may reach interstate conduct." *Emergency One,* 23 F. Supp.2d at 964.

State statutes that allow indirect purchaser claims are commonly referred to as repealer

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Corp. 646 N.W.2d 440, 446 (Iowa S.Ct. 2002); *Avoiding Impotence, infra* at p.7, p. 1735. Accordingly, Plaintiff refers to the case for its insightful and persuasive analysis of the issues.

[3] Judge Adelman reviewed Wisconsin Legislative Council staff memorandum and a Legislative Reference Bureau ("L.R.B.") analysis, the entire Legislative Council bill file for 1979 Assembly Bill 831, as well as the drafting records of 1977 Assembly Bill 685 and 1975 Senate Bill 666, which were earlier attempts to overhaul the antitrust statutes. *Emergency One,* 23 F. Supp.2d at 963-964.

statutes, because they repeal the effect of *Illinois Brick*. In the *ARC America* case, *supra*, the defendants challenged the repealer statutes in California, Alabama and Minnesota,[4] claiming that by overruling *Illinois Brick* they were interfering with a federal policy, and that the state statutes were, therefore, preempted. The U. S. Supreme Court disagreed, finding that state repealer statutes, such as Wisconsin's, were not preempted. *ARC America,* 490 U.S. at 102.

This is significant because preemption would not even be an issue unless the state repealer statutes applied to commerce that has interstate elements. Preemption requires that the state law overlaps some area covered by the federal law. *Id.* at 100-101. In other words, for preemption to be an issue, both laws would have to apply to interstate commerce. Even though the state repealer statutes and the federal statutes overlapped, the Supreme Court found that there was no preemption because there was no conflict between the purposes of the state and federal statutes.

> Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.

Id. at 102. The Supreme Court noted that both the federal and state antitrust statutes are part of an overall statutory scheme to promote competition.

Federal antitrust law was intended to supplement, not displace, state law remedies. *Id. See also,* Note, *Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce,* 54 Vanderbilt L.R.1705, 1707 (hereafter "*Avoiding Impotence*") ("[T]he legislative history accompanying most state and federal antitrust statutes

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[4] The statutes of these states are very similar to Wis. Stats. Ch. 133.

indicates that the two sets were designed to function as equally potent ingredients in a comprehensive protective scheme.").

Consistent with that long-standing relationship between federal and state laws, states that passed *Illinois Brick* repealer statutes were filling the gap left by their federal counterparts – providing a remedy for indirect purchasers that were harmed by interstate conduct that affected trade or commerce within their borders. *See e.g. In re Microsoft Antitrust Litigation,* 2001 WL 1711517, p. 3 (Me. Superior March 26, 2001)("[T]he passage of the *Illinois Brick* repealer ... reveals a legislative intent to fill the gap outlined in *Illinois Brick* that prohibited indirect purchaser suits and **to reach interstate conduct affecting trade or commerce**" within the state); *see also In re Cardizem CD Antitrust Litigation,* 105 F.Supp.2d at 665-666 (applying Wisconsin law). The cases construing repealer statutes have found that they apply to indirect purchasers affected by interstate monopolies who would otherwise be excluded under federal law.

The trial court summarily dismissed this aspect of the amended legislation, finding it just as likely that the legislature intended to maintain a dichotomy between interstate and intrastate commerce.

> It seems to me that since Wisconsin courts looked to federal law in construing state anti-trust [*sic*] statutes, it seem to me equally likely that the legislature, when they went about the business of changing the law, intended to preserve indirect purchaser actions or cases involving ... intrastate state [*sic*] commerce only and let the interstate cases be dealt with by federal law.

(R.88; App.17.) This interpretation emasculates the protection the legislature provided and totally ignores the reason for the repealer legislation.

Wisconsin was one of only 16 states progressive enough to legislatively repeal *Illinois Brick* to allow its citizens to recover for indirect purchaser claims. *See ARC America,* 490

U.S. at 98, n.3. It is inconceivable that the Wisconsin legislature intended this statutory protection would not apply to the overwhelming majority of monopolies operating within and causing harm to consumers in this state.

By definition, indirect purchaser claims never involve a direct transaction between the consumer and the monopolist. The monopolist puts its products into the chain of commerce. These products are distributed and ultimately sold to Wisconsin consumers by middlemen, *i.e.* distributors, wholesalers, retailers, etc.

If Wisconsin's statute is limited to purely intrastate commerce, the protection it affords to Wisconsin consumers would only exist where the entire chain of distribution starts and ends within this state. If the monopolist, or any of the middlemen in the chain of distribution, conducted substantial activities outside the borders of Wisconsin, for example, maintaining offices, hiring employees, manufacturing product, marketing, selling, or shipping to or from other states, the issue becomes one of interstate commerce. Under the trial court's overly restrictive interpretation, most monopolistic activities would be exempt from Chapter 133 and the vast majority of products consumed in Wisconsin would be excluded from state regulation, leaving a gaping hole in the protection of Wisconsin consumers.

The trial court's narrow application of Ch. 133 would exclude nearly all monopolies, since few sales are purely intrastate, and effectively render Wisconsin's statute a dead letter. *See In Re Brand Name Prescription Drugs*, 123 F.3d 599, 613 (7th Cir. 1997).

In a recent decision of the Wisconsin Supreme Court, *Conley Publishing Group v. Journal Communications, Inc.*, 2003 WI 119, the Supreme Court considered the application of federal precedent to Wisconsin's antitrust statute in the area of predatory pricing. Conley

Publishing took the position that the Supreme Court should not follow the very restrictive federal precedent on predatory pricing. Because there is a dearth of Wisconsin case law on predatory pricing cases, the Supreme Court noted that Wisconsin courts tend to follow federal court interpretations of the Sherman Act. In its discussion, the Supreme Court included as a gratuitous observation that the dearth of state case law was not surprising "because the scope of Chapter 133 is limited to the intrastate transactions." *Id.* at ¶16, citing *Reese v. Associated Hosp. Serv.* 45 Wis. 2d 526, 532, 173 N.W.2d 661 (1970).

This dicta in *Conley* and the reference to *Reese* is not a holding on the issue presented to the trial court in this case, but rather follows a long line of cases which have found the close relationship between Wisconsin's antitrust statute and the Sherman Act as a basis for relying on federal precedent to interpret the state statute. None of these cases, including *Conley*, considered or ruled upon the application of Wisconsin's antitrust statute to cases where product sold in this state involves some element of interstate commerce in the chain from the producer to the consumer.

Microsoft argued, and the trial court apparently agreed, that it was just as likely that the legislature enacted the 1980 amendments fully intending to follow *Pulp Wood*'s limitation. The legislative history, however, is silent on *Pulp Wood*, and there is certainly no suggestion that the legislature recognized or accepted any intrastate limitation on the scope and application of Wisconsin's antitrust statute. To the contrary, the only case Plaintiff found mentioned in the legislative history materials was *State v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1 (1966), which, as will be discussed below, found that Wisconsin's

antitrust statute would apply to interstate commerce in appropriate circumstances.[5]

When one considers the legislative history of the statute, its subject matter and context, the trial court's interpretation of the legislature's intent is not "equally likely." (R.88; App.17.) The trial court failed to consider in the same detail as Judge Adelman the legislative history behind the statute, and how its narrow interpretation would subject the policy behind the amended statute by denying to the citizens of this state the very protections and remedies the legislature provided in overruling *Illinois Brick*.

B. The Trial Court's Construction Of § 133.03(2) Violates The Purpose And Intent Of The Statute.

Another of the factors to examine in divining the legislature's intent is the purpose of the statute. In the legislature's own words:

> The intent of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition. It is the intent of the legislature that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition. It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Wis.Stats. § 133.01.

Overlapping state and federal antitrust statutes are part of an overall statutory scheme to promote competition. *ARC America,* 490 U.S. at 102. The trial court's adherence

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[5] Plaintiff requests the Court take judicial notice of an excerpt from the Legislative History of Wis. Stats. Ch. 133 (1980), L.1979, C.209, § 2, eff. May 2, 1980, attached hereto as App.21.

to historically outdated divisions between the state and federal regulation of monopolies is inconsistent with that scheme and purpose. If this Court were to affirm the trial court's ruling and construe Chapter 133 as being limited to solely intrastate commerce, it would violate the intent of the Act and the legislative mandate "that this chapter be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." That intent must include the right to protect Wisconsin consumers in intrastate transactions such as here.

The trial court's interpretation excludes almost all commercial conduct from the policing powers of the State of Wisconsin to enforce the legislature's intent. Because almost all commercial activity has some interstate elements, there would be nothing for the statute to regulate. It would be, in the words of the Seventh Circuit, a "dead letter." *In Re Brand Name Prescription Drugs,* 123 F.3d at 613. Such an interpretation would fall far short of the legislature's express aim of fostering competition.

While the statute was amended to provide relief to indirect purchasers that no longer have a claim under the Sherman Act as a result of *Illinois Brick,* that purpose too would be frustrated. Nearly all commerce would be excluded, leaving indirect purchasers without any remedy for the vast majority of antitrust and price fixing conspiracies. Wisconsin's effort to fill the gap created by *Illinois Brick* would be rendered meaningless.

The legislature has instructed the courts to liberally interpret the statute to meet the objectives set forth in § 133.01. That can only be accomplished by reversing the trial court's ruling. To affirm it would violate the unequivocal legislative intent.

III. *PULP WOOD* DOES NOT APPLY TO THE AMENDED LEGISLATION.

The trial court failed to consider whether, in light of the scope of the 1980 amendments, *Pulp Wood*'s interpretation of a predecessor statute was of any precedential value. Wisconsin's antitrust statutes underwent an extensive overhaul in the 1979 legislative session, culminating in the 1980 amendment. *Pulp Wood,* however, dealt with the statute that existed in 1914. So even if *Pulp Wood* means what the trial court assumed it meant, it would not control the interpretation of the legislation amended 66 years later.

It is a fundamental rule of statutory construction that a court's interpretation of a statute is binding until the statute is amended by the legislature. *State v. Lindell,* 2001 WI 108, ¶149, 245 Wis.2d 689, 617 N.W.2d 500 (Abrahamson dissenting). Here, the trial court applied an interpretation of prior law from a 1914 case, when the antitrust statute has since been amended to reflect more current commercial realities and constitutional parameters.

As Judge Adelman noted, even if *Pulp Wood* barred the simultaneous application of state and federal antitrust law in 1914, "such a stance would have been entirely in keeping with the prevailing federal constitutional law of the time." *Emergency One,* 23 F.Supp.2d at 965. A decisive factor in most early state antitrust cases was the Supreme Court's "dual sovereignty" theory, which "set forth distinct and mutually exclusive zones of jurisdiction for the states and the federal government." *Id.* at 965, n. 6. But these early state cases "were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute, and the Constitution has since been reinterpreted." *In Re Brand Name Prescription Drugs,* 123 F.3d at 613.

In *Avoiding Impotence* , the commentator chronicles the demise of this

interstate/intrastate dichotomy. He notes that the states initially "assumed the authority to regulate only those activities occurring entirely within their borders." In the early twentieth century, such a "dual-tier antitrust enforcement scheme made perfect sense: The federal government pursued antitrust actions against combinations and conspiracies that were located in more than one state, while state enforcement agencies regulated transactions taking place entirely within a single state." But as the economy modernized, the distinction between interstate and intrastate commerce grew murky. The Supreme Court expanded jurisdiction under the Commerce Clause to include local transactions that had a significant impact on interstate commerce. Now, "very little commercial conduct may fairly be characterized as entirely 'intrastate' in nature." *Avoiding Impotence*, p. 1711-1712.

The author goes on to discuss the modern approach taken by later courts, including the holding in *Emergency One,* which he characterized as a very thorough analysis of the issue. *Id.* at 1735-1739. He notes how Judge Adelman's interpretation of Wisconsin's revised antitrust statute in *Emergency One* is consistent with the current constitutional parameters established by more recent case law and presents a more workable standard that does not eviscerate the statute. *Avoiding Impotence*, 1746-1749.

The *Pulp Wood* case is one of those early state cases that were decided when the dichotomy between intrastate and interstate was clear. But that is no longer the case. And as the dichotomy broke down, Wisconsin, like other states, passed new legislation with its stated intent to "safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which

destroy or hamper competition." Wis. Stats. § 133.01. The amended statute is not to be interpreted according to some historically outdated standard that, in the words of the Seventh Circuit in the *Brand Name Prescription Drugs* case, would essentially kill the statute. *In Re Brand Name Prescription Drugs,* 123 F.3d at 613 ("If the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales ... anywhere ... in the United States ... that are intrastate in that sense.")(Citations omitted.)

Pulp Wood simply does not apply to the amended statute. A case from a different era of constitutional limits and commercial realities does not control the interpretation of the amended statutes.

IV. *PULP WOOD* DOES NOT EXCLUDE INTERSTATE COMMERCE FROM REGULATION UNDER WISCONSIN'S ANTITRUST STATUTE.

The trial court's ruling granting summary judgment on the basis of *Pulp Wood* is also flawed in that it misinterprets the holding of that case. The trial court appears to be relying on a couple of statements by the *Pulp Wood* Court that are equivocal at best. Other Supreme Court decisions make it clear that *Pulp Wood* did not intend to limit the application of the statute as the trial court found.

A. The Language of *Pulp Wood* Does Not Unequivocally Bar Application of Wisconsin's Antitrust Statute to Interstate Conduct.

In arguing to the trial court that *Pulp Wood* excluded application of Wisconsin's antitrust statute in interstate commerce, Microsoft relied on two statements from the decision: (1) "Wisconsin's antitrust statute 'is a copy of the federal statute, except that it applies to

attempts to monopolize trade and commerce within the state..." ; and (2) "The contract we think involved interstate commerce, and if so the federal statute is applicable and will be treated on that basis." (R.77, p.3, quoting *Pulp Wood,* 147 N.W. at 1062, 1066.) Judge Adelman noted in *Emergency One* that the language of the *Pulp Wood* decision "does not unequivocally bar the simultaneous application of state antitrust law..." *Emergency One,* 23 F.Supp.2d at 965. Indeed, the fact that an interstate commercial enterprise is able to monopolize its product within the state would seem to fall within the express language of *Pulp Wood.* Judge Adelman points to two other statements in the *Pulp Wood* decision that suggest that court was merely choosing to apply federal law because there were interstate implications, although both statutes would seem to apply: (1) "So far as this particular case goes, we observe very little difference whether the state or federal statutes or both apply," citing *Pulp Wood,* 157 Wis. at 616; and (2) "If the [state] statute has any application to the facts in this case, it should receive the same interpretation that was placed on the federal act . . ."), citing *Pulp Wood,* 157 Wis. at 625. *Emergency One,* 23 F.Supp.2d at 965.

Those two additional comments by the *Pulp Wood* Court certainly suggest that it was simply choosing to apply the overlapping federal statute, but was not excluding application of the state statute. That interpretation is further suggested by a comment made by the same Wisconsin Supreme Court in a subsequent appeal in the Pulp Wood litigation: "The contract in question involved interstate commerce, and hence the federal statute is the statute to be applied to the case, although little, if any, difference is to be observed in the result in the present case whether the state or the federal statutes, or both, apply." *Pulp Wood*

Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 404, 170 N.W. 230, 232 (1919) ("*Pulp Wood II*") (emphasis added). This language strongly suggests that Wisconsin's Supreme Court was not barring application of the State's antitrust statute, but merely choosing to apply the federal statute since the conduct was interstate in character, even though both applied.

This interpretation is further supported by similar language in a subsequent state Supreme Court decision. In the *Milwaukee Braves* case, the court commented on the overlap between state and federal antitrust legislation, stating: "The state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce, but then, ordinarily, the federal government has an antitrust policy like that of the state." *Milwaukee Braves,* 31 Wis.2d at 721; footnote omitted). This comment is similar to the statement made by the court in *Pulp Wood.* But here, the court's comment clearly suggests that, even though the state statute may be enforced against persons doing business in interstate commerce, because the federal antitrust statute enforces the same policy it will ordinarily be the enforcement tool of choice for such interstate conduct. It is critical to note that the Supreme Court never utilized language that specifically excluded the application of Wisconsin's antitrust statute to interstate commerce that resulted in a monopoly within this state that harmed its citizens.

The trial court also accepted Microsoft's arguments that there were a string of cases which have cited *Pulp Wood* for the proposition that Wisconsin's antitrust statute is a reenactment of the first two sections of the Sherman Act, and that the state law applies to intrastate commerce as distinguished from interstate commerce. (R.88; App.17:13-15) But

those cases, which Microsoft cited in its reply brief (R.77, p.4), actually cite *Pulp Wood* for a different proposition and do not support the argument that Chapter 133 is limited to intrastate commerce.

As Judge Adelman noted, these "subsequent cases have tended to cite *Pulp Wood* summarily for the proposition that Wisconsin antitrust law, though taken from the federal statutes, applies 'to intrastate as distinguished from interstate transactions' — with the goal of citing analogous federal decisions in construing the state statutes." *Emergency One,* 23 F.Supp. 2d at 965. "[T]hese decisions reflexively restate the intrastate/interstate distinction as a mere preface to the courts' reliance on federal cases in interpreting Wisconsin antitrust law." *Id.* at 962. Because none of these cases "examine the scope of state antitrust law with respect to specific allegations of interstate commerce," Judge Adelman found they did not "shed[] much light on where or how the line should be drawn in a case" dealing with the application of Wisconsin's statute to interstate commercial enterprises. *Id.* Thus, these cases do not support the proposition for which Microsoft cites them, and they add nothing to the analysis of the scope of the holding in *Pulp Wood.*

The trial court's decision failed to analyze the amended statute in light of the current economic and constitutional environment in which it was passed, and instead applied a very narrow and historically outdated interpretation of the language used by the *Pulp Wood* court. Judge Adelman found such "[r]ote reliance on the 'intrastate as distinguished from interstate,' *Pulp Wood* to *Grams* line of precedent to dismiss state antitrust claims with any interstate aspect is therefore misplaced and inconsistent with Wisconsin precedent." *Emergency One,*

23 F.Supp. 2d at 966, particularly the *Allied Chemical* and *Milwaukee Braves* cases referenced above. *Id.* at 965-966. The application of those cases is the subject of the next section of this brief.

B. The Trial Court's Interpretation Of *Pulp Wood* Is Inconsistent With The Holdings In *Allied Chemical* and *Milwaukee Braves* .

In rejecting Judge Adelman's analysis in *Emergency One,* the trial court found that he relied too heavily on the holdings in the *Allied Chemical* and *Milwaukee Braves* cases which he found distinguishable because they dealt with issues of preemption. (R.88; App.16:24-17:10.) The trial court's effort to distinguish those cases on the basis of preemption is misplaced and ignores some of the broader principles announced by the Supreme Court regarding the scope of Wisconsin's antitrust statutes to protect the citizens of this state from monopolistic practices regardless of whether the monopolist operates outside the borders of this state.

In *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960), Wisconsin's Attorney General brought an action under Chapter 133 against companies engaged in the manufacture and sale of calcium chloride in this state. The defendants in that case moved for summary judgment, making much the same argument as Microsoft made here. The defendants claimed that they did not operate in Wisconsin, had no office or production plant here, that they sold on a nationwide basis, and that any product delivered to Wisconsin was shipped from a facility out of state.[6] Thus, they argued, they were involved in interstate

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[6] These are nearly identical to the facts raised by Microsoft in support of its argument that Chapter 133 does not cover its conduct. *See* Microsoft's Memorandum of Law In

commerce and were subject to federal antitrust laws that were being enforced against them at the same time by the Federal Trade Commission, which "preempted the field of regulation of interstate commerce respecting monopoly and restraint of trade." *Allied Chemical*, 9 Wis. 2d at 292-293.

The Wisconsin Supreme Court disagreed:

> The Wisconsin statutes were enacted in the exercise of the police powers of the state. The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy. The people of Wisconsin are entitled to the advantages that flow from free competition in the purchase of calcium chloride and other products, and if the state is able to prove the allegations made in its complaint it is apparent that the acts of the defendants deny to them those advantages.
>
> . . .
>
> We conclude, therefore, that the action by the federal trade commission does not amount to a pre-emption and does not preclude the state from acting under its police powers in the making and enforcement of the state statutes.

Id. at 295-296. As Judge Adelman points out in his decision, "while the issue may have been framed as one of preemption, the resulting decision clearly bears on the legislative scope of Chapter 133. In short, the court assumes that defendants' conspiratorial acts – both in and out of Wisconsin – may be subject to Chapter 133 under certain circumstances." *Emergency One,* 23 F.Supp.2d at 966.

In *State v. Milwaukee Braves, Inc., supra*, the State of Wisconsin sued the Braves franchise and the National Baseball League under Chapter 133 when they planned to uproot

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Support of Motion for Summary Judgment. (R.72, pp.7-8.)

the Braves to Atlanta. The trial court found that the defendants had violated Chapter 133 by monopolizing the business of major league professional baseball within the State of Wisconsin. *State v. Milwaukee Braves*, 31 Wis. 2d at 710-711. On appeal, the defendants argued that Chapter 133 did not apply to them because of the federal exemption for major league baseball. The Supreme Court considered the nature of organized baseball and the scope of Wisconsin's antitrust statute. It found that major league baseball "is interstate commerce." *Id.* at 719-720. If, as the trial court found here, Chapter 133 does not apply to interstate commerce, that would have been the end of the analysis. But it was not.

Even though it found that major league baseball was interstate commerce, the Supreme Court found that the defendants' conduct violated Wisconsin's antitrust statute, if it was not preempted by the baseball exclusion. *Id.* That court then examined closely the baseball exemption that had been created by federal precedent and determined that this exemption would, under the requirements of the federal constitution, preclude the application of Wisconsin's antitrust statute. *Id.* at 731-732. But had that not been the case, the court made clear that Chapter 133 would have applied. As Judge Adelman noted, "the majority left little doubt that, in the absence of the unique exemption afforded to professional baseball, acts such as those alleged in the complaint were within the purview of Chapter 133." *Emergency One,* 23 F.Supp.2d at 966.[7]

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[7] Plaintiff notes that the Wisconsin Attorney General has also concluded that the *Milwaukee Braves* case stands for the proposition that Wisconsin's antitrust statutes are not limited to strictly intrastate commerce, and that Chapter 133 extends to interstate commerce in which anticompetitive activities have harmed Wisconsin consumers.

An even more fundamental flaw in the trial court's reasoning is its failure to recognize or address the fact that preemption presupposes that there is an overlap in coverage between the state and federal statutes. *ARC America,* 490 U.S. at 100-101. In other words, preemption would not even be an issue unless Wisconsin's antitrust statute applied to interstate commerce. *See In re Methionine Antitrust Litigation*, 2001 WL 679115, 4-5 (N.D. Cal. 2001).

The Supreme Court's rulings in *Allied Chemical* and *Milwaukee Braves* clearly indicates that the Wisconsin Supreme Court never considered its decision in *Pulp Wood* to limit the application of Chapter 133 to strictly intrastate commerce. That was precisely the point of the court in the *Methionine* case, when it stated that "the *Allied Chemical* and *Milwaukee Braves* Wisconsin Supreme Court decisions simply make no sense if Wisconsin's antitrust laws do not reach interstate commerce." *In re Methionine Antitrust Litigation,* 2001 WL 679115, at p. 4.

The trial court's ruling is hopelessly inconsistent with the holdings of, and policies espoused in, *Allied Chemical* and *Milwaukee Braves.* It is inconceivable that Wisconsin's Supreme Court would construe the statute in such a fashion that would preclude the state from exercising its police power to protect it citizens because the wrongdoer was clever enough to expand its operations beyond the state's border. It is just not logical that the legislature intended that the statute should be construed in such a fashion.

V. THE STANDARD FOR DETERMINING WHEN WISCONSIN'S ANTITRUST STATUTE APPLIES TO INTERSTATE COMMERCE.

The fact that Wisconsin's antitrust statute may apply to interstate commerce does not mean that it is without constitutional limits. As Judge Adelman noted, the outer limits of Wisconsin's power to assert regulatory control over interstate commerce is marked by the Commerce Clause, the Supremacy Clause, the Full Faith and Credit Clause, and the Due Process Clause. *Emergency One,* 23 F.Supp.2d at 967. In his effort to establish a workable standard, Judge Adelman thoroughly analyzed three different standards, including a predominance standard, a contacts-based standard, and an adverse effects standard. The adverse effects standard he adopted is the standard this Court should adopt as well.

A. Predominance Standard

A predominance standard is based on whether the conduct is predominantly intrastate or interstate in character. The problem with such a standard is that it is mutually exclusive. Anticompetitive activities are either predominately intrastate or interstate; they cannot be both. Thus, one excludes the other. As Judge Adelman notes, this would be a way of reintroducing federal preemption of state antitrust law, an approach that has been consistently rejected by the U.S. Supreme Court. *Id.* at 967-968. This standard is not workable.

B. Contacts-Based Standards

Judge Adelman examined two contacts-based standards: minimum contacts based on *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and significant contacts based on choice of law cases. He found that, while minimum contacts works for establishing jurisdiction over persons, it does not work to define the

limits of the legislature to regulate a defendant's conduct.

> While the bounds of personal jurisdiction are marked by due process fairness to the litigant, legislative jurisdiction is generally a broader concept, justified by a state's legitimate interest in its citizens' welfare and limited primarily by principles of comity and federalism.

Id. at 968. While Judge Adelman found the significant contacts analysis to be more apt, it too failed to provide an adequate standard. Because it is based on a state's interest in protecting its citizens, such a standard would apply to almost any nationwide distribution network, and result in the application of a state's antitrust law in situations where trade or economic competition within the state have not been significantly injured. *Id.* at 969.

Even though the trial court ruled that *Pulp Wood* precluded the application of Wisconsin's antitrust statute to interstate commerce, it suggested that *Pulp Wood* would not exclude application of the statute so long as there were some acts committed within the state of Wisconsin. (R.88; App.6:15-20.) Thus, the trial court appears to have embraced a form of minimum contacts standard.

C. Adverse Effects Standard

The standard adopted by Judge Adelman, and the standard that Plaintiff believes should be adopted by this Court, is an adverse effects standard.

> An adverse effects standard would extend the jurisdictional scope of Wisconsin antitrust law to unlawful activity which has significantly and adversely affected trade and economic competition within this state. This standard is consistent with both Wisconsin precedent and judicial interpretations of the scope of federal antitrust law. Most importantly, it comports with the legislative intent of Chapter 133...

Emergency One, 23 F.Supp.2d at 969.

As Judge Adelman noted, the *Allied Chemical* and *Milwaukee Braves* cases appear to have employed just such a standard. In *Allied Chemical,* the Court stated that "Wisconsin statutes were enacted in the exercise of the police powers of the state. The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy." *Allied Chemical,* 9 Wis.2d at 295. The Court clearly applied a substantial effects standard in deciding that the conduct fell within Wisconsin's antitrust statute. And in *Milwaukee Braves,* the court ruled that the "state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce . . ."). *Milwaukee Braves,* 31 Wis.2d at 721. Both certainly imply an adverse effects standard. *Emergency One,* 23 F.Supp.2d at 970.

Judge Adelman adoption of such a standard was not merely window dressing to avoid the criticism of over-reaching. Indeed, he applied his standard to the facts of that case, found that the plaintiff did not meet it, and dismissed the complaint. Thus, his decision was clearly not results oriented.

This standard is consistent with the principles announced in prior Supreme Court rulings on the issue, and the legislative intent expressed in Wis.Stats. § 133.01. It is the best standard to be employed in determining whether Wisconsin's antitrust statute applies to Microsoft's conduct here.

D. Adverse Effects Standard Applied To The Facts

If the adverse effects standard is adopted by this Court, this case is clearly one in

which Wisconsin's antitrust statute should be applied.

In its Complaint, plaintiff alleged that "Microsoft's anti-competitive and monopolistic practices in the conduct of trade or commerce, . . . did use and continues to use to prevent and destroy competition and acquire and/or maintain monopoly power, to deny fundamental product choice in the operating systems and applications software markets for word processing, spreadsheets and office suites, and to raise prices to supra-competitive levels in Wisconsin" in various markets. (R.68, ¶16.) Plaintiff also alleged that Microsoft caused plaintiff to make overpayments to Microsoft for its operating system and applications software. (R.68, ¶2.)

It has already been established in the Federal Action that Microsoft transacted business within Wisconsin and that its anticompetitive conduct has hampered competition within the state. *United States v. Microsoft*, 87 F.Supp.2d at 55.

Those allegations and findings more than meet the adverse effects standard employed in *Emergency One.* And they also meet the minimum contact analysis that the trial court was ready to apply.

VI. IT HAS ALREADY BEEN DETERMINED THAT MICROSOFT'S CONDUCT VIOLATED WISCONSIN'S ANTITRUST STATUTE, AND MICROSOFT IS COLLATERALLY ESTOPPED FROM CLAIMING THAT THE STATUTE DOES NOT APPLY.

As discussed above, Judge Jackson already determined in the Federal Action that Microsoft's conduct violated Wisconsin's antitrust statute. That finding is binding on Microsoft here, so it is collaterally estopped from arguing that the statute does not apply.

Collateral estoppel, or issue preclusion as it is also known, "refers to the effect of a judgment in foreclosing relitigation in a subsequent action of **an issue of law or fact** that has been **actually litigated** and decided in a prior action." *Northern States Power Co. v. Burgher*, 189 Wis.2d 541, 550, 525 N.W.2d 723 (1995), citing *Purter v. Heckler*, 771 F.2d 682, 689 n. 5 (3rd Cir. 1985) (emphasis added). "Unlike claim preclusion, an identity of parties is not required in issue preclusion." *Northern States Power*, 189 Wis.2d at 550-51, citing *Michelle T. v. Crozier*, 173 Wis.2d 681, 687, 495 N.W.2d 327, 330 (1993). For collateral estoppel/issue preclusion to apply, the party against whom estoppel is sought "must have been either a party to or in privity with a party to the prior litigation." *State v. Mechtel*, 176 Wis.2d 87, 96, 499 N.W.2d 662 (1993).

Thus, a litigant that was not a party to a prior case may use collateral estoppel "offensively" in a second action against the party who lost on the decided issue in the first case. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Furthermore, unlike claim preclusion, issue preclusion can prevent relitigation of issues actually litigated and determined in a prior lawsuit, even if the cause of action in the second lawsuit is different from the first. *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis.2d 120, 122 n. 1, 346 N.W.2d 327 (Ct.App. 1984).

Collateral estoppel applies to both findings of fact and conclusions of law. *Heggy v. Grutzner*, 156 Wis.2d 186, 196, 456 N.W.2d 845 (Ct. App. 1990), citing Restatement (2d) Judgments § 27 (1980). Thus, it precludes relitigation of both issues of law and issues of fact conclusively determined in the prior action. *See United States v. Stauffer Chem. Co.*, 464 U.S.

165, 170-171 (1984).

In the Federal Action, Microsoft argued that the State of Wisconsin could not succeed on its claim under Wis.Stats. § 133.03 "without proving an element that is not required under the Sherman Act, namely *intrastate* impact." *United States v. Microsoft,* 87 F. Supp.2d at 55 (emphasis in original). Microsoft's position was that Wisconsin had not established intrastate impact, but rather interstate impact, and that its state law claim should, therefore, be denied. That is substantially the same argument Microsoft makes here. In rejecting that argument, Judge Jackson found that Microsoft's anticompetitive activities extended into, and adversely affected the intrastate commerce of, every state in the nation. *Id.* Judge Jackson has found that Microsoft's anticompetitive conduct hampered competition in Wisconsin, and thus violated Chapter 133. That finding is binding on Microsoft here.

The trial court failed to address this issue in its ruling. But in response to Plaintiff's collateral estoppel argument, Microsoft raised several grounds on which it contended that collateral estoppel should not apply. Accordingly, appellant addresses those arguments here.

Microsoft's first argument was that Judge Jackson did not make any findings regarding overcharges, and thus the central issue in this case for damages was not present in the Federal Action; and so the Court should not apply collateral estoppel. While this case raises an issue of damages that was not present in the Federal Action, that has no bearing on the application of collateral estoppel to issues that were litigated and decided in the Federal Action. The question is not whether the two cases litigated identical causes of action, but whether an issue in this case was litigated and decided in the Federal Action. *Crowall,,* 118

Wis.2d at 122 n. 1. And that is clearly the situation here.

Microsoft's second argument was that, because some of Judge Jackson's rulings were overturned on appeal, it would be unfair and inappropriate to apply collateral estoppel. But what Microsoft ignores is that the rulings on which Plaintiff seeks collateral estoppel were affirmed on appeal. The D.C. Circuit Court of Appeals overturned Judge Jackson's findings of tying violations under § 1 of the Sherman Act, but that court upheld his findings regarding violations of monopolization under § 2. It was those acts constituting § 2 violations that Judge Jackson also found to be violations of Wisconsin's antitrust statute. Thus, the reversal on the § 1 violations would not impact the collateral estoppel effect of Judge Jackson's ruling that Wis.Stats. § 133.03 applied to the § 2 violations.

Those were the two primary grounds Microsoft raised in support of its argument not to apply collateral estoppel. But in a footnote, Microsoft also suggested that Judge Jackson's decision regarding the application of Wisconsin's antitrust statute was "some implied ruling ... on the reach of Wisconsin state law", and as such "would be an alternative holding on a question of law, as to which no collateral estoppel would attach" citing *Reuter v. Murphy,* 2000 WI App 276, 240 Wis.2d 110, 116-118, 622 N.W.2d 464. (R.77, p.9.)

First of all, Judge Jackson's ruling that § 133.03 was violated was not an implied, nor alternative, ruling. To the contrary, he specifically found that the antitrust statutes of each of the states had been violated because the anticompetitive conduct of Microsoft created and maintained monopolies in each of those states to the detriment of the states' citizens. There is nothing implied about that. And this is not an "alternative holding." The Federal Action

was a consolidated action where federal antitrust claims asserted by the federal government were joined with state antitrust claims asserted by the states. They were separate claims, separately adjudicated. These were not alternative grounds on the same claims or causes of action.

Second, *Reuter* is distinguishable. The *Reuter* Court applied what is referred to as the issue-of-law exception to collateral estoppel, which it defined as follows:

> [E]ven though a particular issue may have been litigated and determined in the prior action, relitigation is not precluded if '[t]he issue is one of law and . . . the two actions involve claims that are substantially unrelated.'

Reuter v. Murphy, 2000 WI App 276, ¶10, citing Restatement (2d) of Judgments § 28, p. 273 (1980). The *Reuter* Court applied the exception in that case because the prior case involved "a different accident, involving a different victim, a different negligent driver, a different school district and different facts." *Id.* at ¶11. In that situation, the court did not think it fair to preclude an insurance carrier from raising an issue of law previously decided against it in a prior case. But here, Plaintiff's claim is premised on the very same incidents, the facts are the same, and the actors are the same. The only difference here is the remedy being requested. In this case, the claims are not "substantially unrelated." Thus, the issue-of-law exception does not apply.

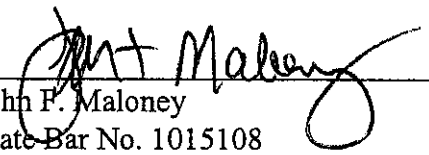
As Judge Jackson has already determined that Microsoft's anticompetitive conduct adversely affected competition in Wisconsin and thus violated Wisconsin's antitrust statute, Microsoft cannot relitigate that issue here. The trial court should have denied Microsoft's motion on that basis alone and yet the trial court essentially ignored this argument.

CONCLUSION

Based on the foregoing, this Court should reverse the ruling of the trial court and remand with instructions that Microsoft's motion be denied.

Dated at Milwaukee, Wisconsin, this 28 day of July, 2003.

McNALLY, MALONEY & PETERSON, S.C.

By: 

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CERTIFICATION AS TO FORM AND LENGTH

I, John F. Maloney, certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of the brief is 8,716 words.

Dated at Milwaukee, Wisconsin, this 28 day of July, 2003.

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

GENE L. OLSTAD,
Individually and On Behalf
of All Others Similarly Situated,

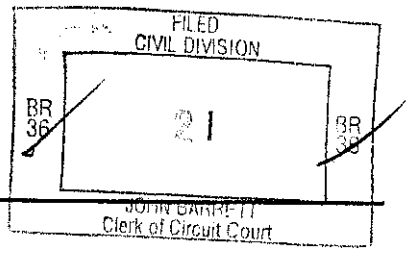
Plaintiff,

vs.

MICROSOFT CORPORATION,
a foreign corporation, and,
DOES 1 through 100, inclusive,

Defendants.

Case No. 00-CV-003042
Unclassified: 30703



ORDER

For the reasons set forth on the record at the hearing on Defendant Microsoft Corporation's motion for summary judgment held on January 13, 2003, it is hereby ordered that Defendant's motion is GRANTED. Plaintiff's amended complaint is DISMISSED with prejudice.

Dated this 21st day of January, 2003.

The Honorable Jeffrey Kremers
Milwaukee County Circuit Court Judge

App. 01

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

GENE L. OLDSTAD,
individually and on behalf of
all others similary situated,
Plaintiff,
vs. CASE NO. 00CV003042
MICROSOFT CORPORATION,
a forein corporation and
Does 1 - 100, inclusive,
Defendant.

January 13, 2003 Before the Honorable,
JEFFREY A. KREMERS,
Circuit Court Judge,
Br. 36, presiding.

A P P E A R A N C E S:

JOHN MALONEY, BEN BARNOW and SUSAN TAYLOR, Attorneys at Law, appeared on behalf of the Plaintiff.

W. STUART PARSONS, JEFFREY MORRIS and KELLY TWIGGER, Attorneys at Law, Quarles & Brady, appeared on behalf of the defendant, Microsoft Corporation.

MOTION HEARING FOR SUMMARY JUDGMENT

Official reporter:
Lee Ann Philbert

WHEREUPON, the following proceedings were begun and testimony taken:

THE COURT: This is the matter of Gene Oldstad versus Microsoft Corporation, 00CV003042. Appearances, please.

MR. MALONEY: John Maloney of McNally, Maloney and Peterson, on behalf of plaintiff, Gene Oldstad. Mr. Ben Barnow is an attorney from Illinois. I submitted a motion Pro Hac Vice to add him to the case and Susan Taylor from Milberg, Weiss, Bershad, Hynes and Lerach, in San Diego and Mr. Barnow on as co-counsel, but I will be addressing the arguments this morning.

THE COURT: Even though, you want to be, Mr. Barnow to be admitted pro hac vice?

MR. MALONEY: That's correct.

THE COURT: Any objection?

MR. PARSONS: No objection.

THE COURT: I don't think I got an order, did I, from you?

MR. MALONEY: I believe there was one attached. If I didn't, I will submit it this afternoon.

MR. PARSONS: Appearing for Microsoft, from Quarles and Brady; Stuart Parsons, with Jeff Morris and Kelly Twigger and I will also introduce to the court,

Jeremy Kamras, K-A-M-R-A-S, from Sullivan & Cromwell in New York. We expect to move Mr. Kamras's admission. We have not filed the papers yet.

THE COURT: We have two other folks here. Are you guys here on this case?

MEN IN COURTROOM:: Spectators, Your Honor.

THE COURT: All right. This is here on Microsoft's motion for summary judgment. Mr. Parsons?

MR. PARSONS: As I re-read the briefs in preparation for this morning, it seemed to me that counsel on both sides had covered the waterfront pretty well. The question of whether or not the Wisconsin antitrust statute has any application to violations that I think everybody here I think would agree were interstate in character, rather than intrastate. That is, bad things happened elsewhere than in Wisconsin or allegedly bad things.

The Supreme Court's 1914 decision in Pulp Wood, we think is still the law. The Court is aware that other judges have seen that differently. Including Judge Krueger in Dane County. Including Judge Adelman in the Eastern District.

However, other Wisconsin Courts of Appeal and very recently, Judge Maxine White in this Circuit, have held that Pulp Wood is the law and the statute has no

application.

We see that as a legal question for decision by the Court and we urge that stare decisis requires the Court to follow Wisconsin Supreme Court in Pulp Wood.

Regarding the 100.18 claim, the problem is that the plaintiff has simply not alleged any advertising on which the named plaintiff relied were a violation of 100.18. To occur there has to be deceptive advertising. This plaintiff didn't look at any advertising. He didn't rely on any advertising. Since he says he wasn't overcharged, there certainly wasn't any causation, even if there was some advertising. We think that one, that one falls. It is simply insufficiently pled.

Those are the counts and for those reasons we respectfully submit that Microsoft is entitled to summary judgment on them.

MR. MALONEY: Good morning, Your Honor. John Maloney. We are here on a legal issue as to whether Wisconsin residents can be covered for anti-trust injury, even if wrongs occur outside the state and the answer is, yes they can.

Wisconsin, in the eighties, almost 70 years after the Pulp Wood decision, amended the Statute not to restrict the ability of residents in Wisconsin to make claims for anti-trust injuries, but to expand it.

We have fully briefed the issues. I am not going to repeat, regurgitate the entire argument. However, in the 80's, indirect purchasers were allowed to assert claims in Wisconsin for injuries occurring in Wisconsin. We have asserted in our complaint that injuries occurred in Wisconsin. Bad acts were conducted in Wisconsin by Microsoft.

THE COURT: What bad acts occurred in Wisconsin?

MR. MALONEY: The finding of the Federal Court in, Judge Jackson in the Federal Criminal investigation found that the anti-trust activities of Microsoft occurred on a nationwide basis and in fact he found the inter-activity of Microsoft impacted the residents in Wisconsin.

THE COURT: I don't think I have much quarrel with it, if there were anti-trust actions by Microsoft anywhere that there would be an impact on someone in Wisconsin who purchased one of their products. But I think the question is, what bad acts did they carry out in Wisconsin?

MR. MALONEY: They advertised and they sold in an anti-competitive method. Three things we pled; distorted competition by virtue of anti-trust activities of theirs. They prevented the development of alternative competitors to provide competitive markets

and products and consumer choice as limited by the anti-activities, which occurred in Wisconsin by virtue of the anti-trust violations that were found by Judge Jackson.

So they did, through comission and commission in Wisconsin limit competition, so as to damage Wisconsin residents and it is those in-direct claims that the legislature addressed in the 80's, in an effort to make it clear that Wisconsin residents should be protected from that activity, even if it is interstate, not intrastate.

The Supreme Court in the Allied Chemical case ruled; the public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal conspiracy or combination.

That is what Microsoft has done that has caused damage and injury to Wisconsin residents and as a matter of law, I believe that the Wisconsin residents are entitled to protection of our state anti-trust statute.

I would also point out that Microsoft, I'm not sure that this is in the findings of Judge Jackson. I will verify that. But Microsoft also advertised on its Web Site and sold its products through its Web Site to consumers throughout the United States and it is in that

sense that the activities of Microsoft are actionable here in Wisconsin as well.

THE COURT: Don't we need a prove who suffered some of the damages though?

MR. MALONEY: Let me address that. Counsel referred in his motion paper to specific limited questions that were addressed to Mr. Oldstad and Mr. Oldstad is a plaintiff who has pursued this claim on behalf of himself and other class members. Is Mr. Oldstad knowledgeable as to how or in what sense his injuries occurred or what monetary value is? He does not know what the damages are.

THE COURT: We are at the point, the class has not been certified in this case. So, aren't I limited by Mr. Oldstad's, by his situation and by his knowledge and by his, whatever injuries he suffered? And I agree with you, if we get past this motion for summary judgment, then I have to decide whether it is appropriate to certify a Class. But we haven't done that yet, so aren't I limited by him?

MR. MALONEY: And if you review the transcript of his entire deposition, he did not, was not able to quantify the amount of his injury. But he is an active participant in moving the case forward, because he feels he has been wronged. He can't testify as to the

monetary nature of the wrong, but that would be in the area of expert witness testimony that we are fully prepared to address on his behalf.

THE COURT: I agree with the part of what you said, that he can't and I wouldn't expect at this stage of the proceedings that he would be able to quantify all his damages or certainly the Class damages. But I'm not so sure that I agree with you that he has said anywhere in here that he was damaged in any amount.

Where do I get that from this transcript? I read it to be that he didn't rely on any advertising. He didn't rely on any sort of point of sale displays or anything else, you know. He just happens to be someone who has purchased Microsoft products and he is the plaintiff in this case.

MR. MALONEY: It is more than that. He is a plaintiff who is aware of the fact that Microsoft has been determined by a federal district judge to have engaged in a monopoly and created a monopoly that impacted on him as a purchaser of their products.

Does he know, was he cheated out of $5, $10, or $20? He honestly doesn't know. But he is a willing plaintiff who knows that a Federal District Court has found Microsoft in violation of federal law and that they have created a monopoly and he believes that he has the

right to be heard in court as to what his damages are as a result of that monopoly.

So, it is more than just a point of sale. More than just an advertisement. I don't agree with counsel and on the 118 statutory argument that it only relates to advertisements. I think it is anything that is misleading or misrepresentive is also covered by that statute. And I believe that both causes of action should survive this motion for summary judgment and I dealt with that in our brief, Your Honor.

MR. PARSONS: May I have a last word?

THE COURT: Are you done?

MR. MALONEY: Can I say one other thing, I have not addressed. I have not asked the Court to find at this point in this proceedings that Judge Jackson's findings are entitled to enforcement under the theory of preclusion/collateral estoppel issue. We do intend to address that in the future.

Judge Jackson found Microsoft is in violation of Federal Law and violated Wisconsin law by creating a monopoly, an unfair monopoly in this segment of the market and on that basis we believe the defendant's motion should be denied, Your Honor.

THE COURT: Mr. Parsons?

MR. PARSONS: Regarding the applicability of

Wisconsin anti-trust law, the Court asked the plaintiff's counsel what alleged anti-trust violations occurred in Wisconsin. And counsel asserted that some did. But the only one I heard that had any specificity to it was impact. Some people allegedly bought software or an operating system application and were over-charged. That is impact.

How did those overcharges happen? Well, they happened in a number of ways, where all those things occurred outside the State of Wisconsin. For example, it is alleged that Microsoft had certain exclusionary arrangements with the original equipment manufacturers. The computer manufacturers like Dell and Compaq, that had anti-competitive affects.

Well, those arrangements were made outside of Wisconsin. Compaq's not here. Dell is not here. No O.E.M. is allegedly here. Microsoft isn't here. So, this is a case just like presented in Pulp Wood and all of the Court of Appeals decisions which follow Pulp Wood. Allegedly violative acts occurred outside of Wisconsin. Wisconsin residents were allegedly affected by that. No. Because of acts under Wisconsin anti-trust laws. If the Wisconsin legislature had wanted to change that rule, when it repealed Illinois Brick, it could easily have said so. Those cases stood since 1914. The legislation

simply did not address the Pulp Wood holding. And I don't think there is a fair question about that.

We, of course agree with the Court that there is one plaintiff before the court; Gene Oldstad and it is his claim that has to survive this motion for summary judgment, because nobody else is here.

Gene Oldstad doesn't say he was hurt. He says just the opposite. I asked him point blank, plain English: "You think you were overcharged?" He said, "No". "Did you read any advertising?" "No."

"Did you rely on anything Microsoft was saying?" "No."

That claim simply cannot survive. So, for the reasons stated, we urge the Court to grant the motion for summary judgment.

THE COURT: Anything else?

MR. MALONEY: Briefly. I attached to my affidavit on Tab 3, the decision of the Maine Court, certainly not dispositive on this court. This exact issue was addressed by the Maine Court and resolved in favor of plaintiffs.

Mr. Oldstad is here on his own behalf. But he is attributed class representative. That has not been brought forward in terms of a motion for class certification. But we intend to do that.

Counsel's reference to legislature's not reversing Pulp Wood. In my experience the legislature doesn't spend a lot of time normally addressing Supreme Court decisions in their deliberative function. Sometimes they do, but not frequently.

The repealer statutes in the 80's, to get around Illinois Brick was clearly to expand exposure for wrong doing by companies in the market place and repealer statutes, I believe change the law, as Pulp Wood was established in 1914. I think the better rule is the rule articulated by Judge Adelman in United States District Court, which we addressed in our brief, Your Honor.

THE COURT: Maybe this is exposing my lack of knowledge in these things but, and maybe this has nothing to do with ultimately my decision in this case. But there is a Federal case going on, right? Not just criminal one, but also a civil one involving Microsoft?

MR. MALONEY: There are numerous cases that were removed to the M.D.L. before Judge Motz in Baltimore, Your Honor.

THE COURT: So, why wouldn't that case take care of whatever claims anybody in the country has that has been harmed by Microsoft's actions, assuming they were harmed by Microsoft's actions.

MR. MALONEY: Mr. Barnow is co-lead on the

National Class case. I would like him to address that.

MR. BARNOW: Actually, I guess the best summary sense is, we tried. There was a settlement which Judge Motz did not approve back on January 11, 2002. So, we are coming up just past the anniversary of it, which I guess is serendipity regarding the California events.

The reason is that there are approximately -- a lot of good lawyers will correct me. It fluctuates. 18 jurisdictions in the country that allow recovery on behalf of in-direct purchasers.

Wisconsin is a state which is known as a repealer state which, all of those jurisdictions are known as. And the reason they are called repealer states, repealer jurisdictions, is that those state legislatures, as Wisconsin, made a conscious decision and legislative decision to get away from what those people, governments thought was the harsh effect of a case called Illinois Brick, which was interpretation of federal anti-trust laws that did not permit in-direct recoveries.

That is fundamentally the reason. So, settlements you see and read about or efforts that Microsoft publicly referenced and as referenced in chambers is directly towards those repealer states where they feel there is exposure or reasons for settling under those laws that do provide for in-direct recoveries; federal settlement

having failed.

THE COURT: Okay. I'm going to take about five, ten minutes here. Then I will be back with a decision.

(Court in ten minute recess and then back on the record.)

THE COURT: Okay. Here are my thoughts and my decision with respect to this matter.

I agree with Mr. Parsons' opening comment that the issue has been extensively and very well briefed by both sides. I and my law clerk were unable to find any other cases that you folks hadn't given us or any other brilliant analysis out there that somebody else had come up with that the two of you hadn't from one side or the other posed, put forward.

So, I think I have got everything in front of me that is out there with respect to the issues and the principle issue, I mean it seems to me there are sort of three areas that I need to make a decision about.

One is the application of the Wisconsin anti-trust statute, whether it applies to interstate or just intra-state activity. Another is the liability of plaintiff's 118, false advertising claim and I'm being generous in the term, encompassing all the things that 108.1 includes, which is more than just a flier in a newspaper; obviously covers any kind of a statement.

I'm not going to try to quote the statute, but it is quite extensive and then the third sort of overriding issue for me is whether Mr. Oldstad is a, has got a claim at all here for any of these things, based on what is in the, in his deposition. Because this being a motion for summary judgment, that is what I look to or any other affidavits that have been submitted. I don't think there are any other ones on his behalf, at least I'm not aware of any. All we have is his testimony by way of the deposition for his claim.

With respect to the application of the anti-trust statute, I think what it really comes down to is whether, in my view, whether the holding in Pulp Wood Company vs. Green Bay Paper and Fiber Company, both in its original decision at 157 Wisconsin 604 and then in the second appeal, at 168 Wisconsin 400, whether the holdings from that, from those decisions, apply today or whether because of either more recent case decisions or the legislative action, Judge Adelman's analysis in the --

MR. PARSONS: Emergency One.

THE COURT: Emergency One, thank you, case applies. In my view, and it is my decision that the holding in Pulp Wood is still good law in Wisconsin. And that what, while I understand and feel some of Judge Adelman's analysis, it seems to me that he relies too

heavily on the Allied Chemical and the Milwaukee Braves cases for his reasoning and in my view those cases are more about pre-emption and the sort of odd position that we hold baseball in this country in, and today's legislative protection that baseball has been given federally and my reading of those cases suggested that those decisions were more about pre-emption than they were about the sort of reassessment of what it means to have a state anti-trust statute and what kinds of activity it covers.

And I believe that the Pulp Wood decision, essentially where interstate commerce is indicated, implicated, the federal statutes apply. There is a string of cases subsequent to that that follow that same reasoning. Until we get to the Allied Chemical case and the Braves case and then Emergency One case.

It seems to me that since Wisconsin courts looked to federal law in construing state anti-trust statutes, it seems to me equally likely that the legislature, when they went about the business of changing the law, intended to preserve indirect purchaser actions or cases involving interstate commerce only -- intrastate state commerce only and let the interstate cases be dealt with by federal law. Only it seems to me that is just as reasonable a conclusion as that posited by the plaintiff

and it is the interpretation I'm placing on this matter.

I also think that 100.18 does require an advertisement of some sort or statement of some sort and in looking at the plaintiff's complaint, amended complaint I should say, I only found two paragraphs that in my view resembled such a statement.

One was Paragraph 94, 94 E and G. And I don't believe either of those rise to the level required under 100.18(1) to justify a claim for false, loosely called false advertising. More importantly, as far as I'm concerned, I just don't think Mr. Oldstad is a proper plaintiff to put forth these claims.

I read his deposition transcript. I read it about four times, because I frankly had trouble understanding why he was the plaintiff in this case. What his, what harm he was claiming to have suffered and I don't see it. He just didn't rely on anything that I could see that he was, at the end of the complaint, claiming was the basis for any harm and I think that a plaintiff, even one who wants to step into the shoes of the representative of the class, first has to show that he is a plaintiff in his own right and then that he is entitled to speak for the class, would be the class representative and I don't think, in his own right, Mr. Oldstad is a proper plaintiff.

Do I think there is a plaintiff out there in Wisconsin? Well, under my view of the world with respect to Pulp Wood, I don't think there is. But certainly not Mr. Oldstad. I do not think that there has been, whatever Microsoft has been accused of or found to have done wrong by Judge Jackson, did not occur, in my view, in Wisconsin.

The impact of those bad acts as found by Judge Jackson certainly was felt by anybody who purchased a Microsoft product of the type that was covered by Judge Jackson's decision, was felt by a person in Wisconsin. But the bad acts didn't occur here and I think they have to, to bring a claim under Wisconsin anti-trust law.

For those reasons, I'm granting the defendant's motion for summary judgment. On a side issue, I'm satisfied Mr. Maloney, with the submission that you sent to me with respect to how Mr. Oldstad came to be represented by your firm and I intend to, and am totally satisfied with that explanation and I intend not to take any other action with respect to that. If anybody needs clarification on that, I will give it. But I think you folks know what I'm talking about. Anything else?

MR. PARSONS: No.

MR. MALONEY: No, Your Honor.

(END OF PROCEEDINGS.)

App. 19

STATE OF WISCONSIN)
) Ss.
MILWAUKEE COUNTY)

I, Lee Ann Philbert, an official reporter do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of 19 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and that it is a true and correct transcript of said proceedings had in said matter to the best of my knowledge.

Dated this 27 day of Jan, 2003.

Lee Ann Philbert

Lee Ann Philbert
Court Reporter

App. 20

towns, school districts, ...orporate, and all corpora-... ...ns, joint ventures, joint ...es and other legal or ...ed by the laws of this or ...territories or any for-... ...onstrued to affect labor ...ized to promote the wel-... ...ions intended to legiti-... ...manufacturing in this ...of farmers, gardeners or ...rs and fruit growers ...r its members or share-... ...d by its members or ...t s. 133.10, 133.11 or ...

(1) Every contract, ...

...not more than $100,000 for each offense.

133.04 PRICE DISCRIMINATION; INTENT TO DESTROY COMPETITION. (1) No person may discriminate, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, for the purpose or intent of injuring or destroying competition in any level of competition or any person engaged therein.

(2) Any person violating this section may be fined not more than $25,000 or imprisoned in the county jail not more than one year or both.

133.05 PRICE DISCRIMINATION; LESSENING COMPETITION. (1) No person may discriminate, either directly or indirectly, in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition in any line of commerce or tend to create a monopoly in any line of commerce.

(2) This section:

(a) Shall not prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the commodities are sold or delivered to the purchasers.

1155
Date Rec'd 3/21
Sub. Amdt. Amdt.
RECOMMEND [illegible]

Att. Robert [illegible]
Michael [illegible]
[illegible] s. 133.21 (6)
[illegible]
[illegible] damages
[illegible] sub. (2) [illegible]

3/14/82d

State vs. Milw. Brakes
Illinois brick case

Yes No

COURT OF APPEALS OF WISCONSIN
DISTRICT I

GENE OLSTAD,
individually and on behalf of all
others similarly situated,

Plaintiff-Appellant,

v.

Appeal No. 03-1086

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100 inclusive,

Defendants-Respondents.

**ON APPEAL FROM THE CIRCUIT COURT
FOR MILWAUKEE COUNTY
THE HONORABLE JEFFREY KREMERS, PRESIDING
CASE NO. 00-CV-003042**

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT MICROSOFT CORPORATION

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STATEMENT OF ISSUES

Does Wisconsin's antitrust act, Wis. Stat. § 133.03, reach conduct that occurs exclusively outside Wisconsin and that predominantly affects interstate commerce?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Microsoft does not request oral argument, but does request that the Court's opinion be published.

STATEMENT OF THE CASE

In April 2000, Plaintiff-Appellant Gene Olstad brought suit against Defendant-Respondent Microsoft Corporation alleging that Microsoft violated Wisconsin's antitrust act, Wis. Stat. § 133.03, and Wisconsin's prohibition against fraudulent advertising, Wis. Stat. § 100.18(1). Olstad claims that Microsoft, through a nationwide course of anticompetitive conduct, illegally acquired and/or maintained monopolies that permitted it to overcharge consumers of its operating systems and certain applications software, and deceived consumers into believing that the prices for its products were established by competitive market forces. (R. 68 at ¶¶ 150-162.) Olstad purports to represent consumers who acquired in Wisconsin a license for MS-DOS or Windows or a license for an Intel-compatible version of Word, Excel or Office. (R. 68 at ¶ 8.)

Microsoft moved for summary judgment, asking the trial court to dismiss Olstad's complaint in its entirety. (R. 71; R. 72 at p. 10.) As to Olstad's antitrust claim, Microsoft's motion was based on long-established Wisconsin authority holding that our antitrust act does not apply to out-of-state conduct that predominantly affects interstate

commerce. According to Olstad's complaint, Microsoft is neither organized nor incorporated under Wisconsin law nor does it have its principal place of business in Wisconsin. (R. 68 at ¶ 5.) Moreover, Olstad does not allege that Microsoft maintained monopoly power by engaging in unlawful conduct in Wisconsin. To the contrary, the conduct Olstad alleges to be anticompetitive -- such as Microsoft's alleged "domination and control" of the OEM channel (R. 68 at ¶ 64), its "predatory acts" directed at Digital Research's DR-DOS (R. 68 at ¶ 81), its "predatory campaign" to drive IBM's OS/2 from the operating systems market (R. 68 at ¶ 97), and its "abuse [ ] and leverage [ ]" of the Windows platform "to acquire and/or maintain monopoly power in certain applications software markets" (R. 68 at ¶ 130) -- all occurred *outside* Wisconsin. Finally, the challenged conduct allegedly affected commerce that extends far beyond Wisconsin. Indeed, Microsoft distributes its software on a

worldwide basis. (R. 68 at ¶ 5.)[1]

Agreeing with Microsoft, the trial court ruled that Wisconsin's antitrust act does not apply to the conduct alleged here and that Olstad's antitrust claim should therefore be dismissed. (R. 88 at p. 18.)

Microsoft also argued that Olstad's claims should be dismissed because he had suffered no injury as a consequence of the alleged overcharge. (R. 77 at p. 3.) Indeed, Olstad twice testified at his deposition, "I don't think I was overcharged." (R. 77: Tab A at p. 38.)

Here too the trial court agreed with Microsoft:

> More importantly, as far as I'm concerned, I just don't think Mr. Olstad is a proper plaintiff to put forth these claims. I read his deposition transcript. I read it about four times, because I frankly had trouble understanding why he was the plaintiff in this case. What his, what harm

---

[1] In his Statement of the Case, Olstad makes much of the fact that "Microsoft sold its products and distributed licenses to hundreds of thousands of consumers in Wisconsin and conducted extensive advertising and sales activities within Wisconsin," that Olstad and other consumers in Wisconsin "were the foreseeable victims of Microsoft's anticompetitive conduct and have paid artificially inflated prices for Microsoft's software licenses," and that these purchases were "in Wisconsin and as such are intrastate transactions." Pl. Br. at 1. But these allegations pertain to impact or to conduct not alleged to be anticompetitive -- not to the situs of Microsoft's allegedly anticompetitive conduct.

> he was claiming to have suffered and I don't see it. . . . Do I think there is a plaintiff out there in Wisconsin? Well, under my view of the world with respect to *Pulp Wood*, I don't think there is. But certainly not Mr. Olstad.

(R. 88 at pp. 17-18.)

Olstad now appeals the dismissal of his antitrust claim.[2]

ARGUMENT

I. Wisconsin's Antitrust Act Does Not Reach Out-of-State Conduct That Predominantly Affects Interstate Commerce.

A. Wisconsin Law Is Clear That "The Scope of Chapter 133 Is Limited to Intrastate Transactions."

On July 17, 2003 -- just before Olstad filed his brief with this Court -- the Wisconsin Supreme Court noted that "[t]he dearth of state antitrust precedent is not surprising because **the scope of Chapter 133 is limited to intrastate transactions**." *Conley Publishing Group Ltd.* v. *Journal Communications, Inc.*, 2003 WI 119, ¶ 16, 665 N.W. 2d 879, 885 (2003) (emphasis added).

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[2] Olstad does not appeal the trial court's dismissal of his claim under Wisconsin's prohibition against fraudulent advertising.

This has been Wisconsin law since 1914, when the Supreme Court ruled in *Pulp Wood Co.* v. *Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), that our antitrust act "applies to attempts to monopolize trade and commerce *within the state*. . . ." *Id.* at 625 (emphasis added). Indeed, *Conley Publishing* is only the latest in a long line of authority from the Wisconsin Supreme Court and Court of Appeals -- including this Court in *American Medical Transport* -- that has consistently confirmed *Pulp Wood*'s holding:

> "We have repeatedly stated that Sec. 133.01, Stat., was intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890, 15 U.S.C. secs. 1 and 2, *with application to intrastate as distinguished from interstate transactions*. . . ." *Grams* v. *Boss*, 97 Wis. 2d 332, 346, 294 N.W. 2d 473, 480 (1980) (emphasis added).
>
> "The parts of [Section 133.01(1)] making a conspiracy in restraint of trade a crime and illegal . . . *applies to intrastate instead of interstate transactions*. . . ." *John Mohr & Sons, Inc.* v. *Jahnke*, 55 Wis. 2d 402, 410, 198 N.W. 2d 363, 367 (1972) (emphasis added).
>
> "Sec. 133.01, Stats., has been held by this court to be a reenactment of the first two sections of the federal Sherman Antitrust Act, *with application to intrastate as distinguished from interstate transactions*. . . ." *Reese* v. *Associated Hospital Service, Inc.*, 45 Wis. 2d

> 526, 532, 173 N.W. 2d 661, 664 (1970) (emphasis added).
>
> "[S]ec. 133.03(1) and (2), Stats., . . . were intended as a reenactment of the first two sections of the federal Sherman Antitrust Act of 1890, 15 U.S.C. secs. 1 and 2, *with application to intrastate as distinguished from interstate transactions. . . .*" *American Medical Transport, Inc.* v. *Curtis-Universal, Inc.*, 148 Wis. 2d 294, 299, 435 N.W. 2d 286, 288-89 (Ct. App. 1988) (emphasis added), *rev'd on other grounds*, 154 Wis. 2d 135, 452 N.W. 2d 575 (1990).
>
> "The federal antitrust law, the Sherman Act, applies to interstate commerce, *while the state law applies to intrastate commerce.*" *Independent Milk Producers Co-Op.* v. *Stoffel*, 102 Wis. 2d 1, 6-7, 298 N.W. 2d 102, 104 (Ct. App. 1980) (emphasis added).

Every Wisconsin appellate decision that has addressed the issue has said the same thing: Chapter 133 applies to *intrastate* transactions only. The trial court was thus clearly correct when it dismissed Olstad's antitrust claim on the ground that "whatever Microsoft has been accused of or found to have done wrong by Judge Jackson [in the government action], did not occur, in my view, in Wisconsin. . . . [T]he bad acts didn't occur here and I think they have to, to bring a claim under Wisconsin anti-trust law." (R. 88 at p. 18.)

B. Olstad's Arguments About the Scope of Chapter 133 Fail.

Olstad argues that the trial court was wrong for four reasons: (1) the trial court should have ignored Wisconsin Supreme Court decisions; (2) *Pulp Wood* does not really mean what it plainly says; (3) even if *Pulp Wood* means what it says, it was overruled *sub silentio* by two later cases and then repealed by the 1980 amendments to Chapter 133; and (4) the decisions of the Wisconsin Supreme Court and Court of Appeals are irrelevant because a federal district judge in Washington, D.C. has reached a different conclusion, and Microsoft therefore is collaterally estopped from challenging that decision.

Each of these arguments is without merit.

1. The Trial Court Properly Applied Wisconsin Decisional Law.

Olstad's first argument is that the trial court committed error because, "[r]ather than examin[ing] the plain language of the statute, the trial court relied" upon the Supreme Court's decision in *Pulp Wood*. Pl. Br. at 4. Olstad offers no authority for the unorthodox proposition that a Wisconsin trial court may -- let alone must -- turn a blind eye to what Wisconsin appellate courts have said about a statute's

meaning. Trial courts are indeed bound by *stare decisis* to follow appellate court decisions, and "the Supreme Court is the only state court with the power to overrule, modify or withdraw language from a previous Supreme Court case." *Cook* v. *Cook*, 208 Wis. 2d 166, 189, 560 N.W. 2d 246, 256 (1997).

2. The "Plain Language" of *Pulp Wood* Requires Dismissal.

According to Olstad, the trial court's ruling granting summary judgment is flawed because the Court in *Pulp Wood* "was not barring the application of the state's antitrust statute, but merely choosing to apply the federal statute . . . even though both applied." Pl. Br. at 17. This is incorrect.

Pulp Wood arose out of a series of contracts to supply a paper mill with raw materials. 157 Wis. at 615. When the supplier sued for payment under the contracts, the paper mill argued that the contracts were void under the federal and state antitrust statutes. *Id.* In relevant part, the Wisconsin Supreme Court held:

> The complaint shows that the wood supply furnished to the plaintiff came from the states of Wisconsin, Minnesota, and Michigan, and the Dominion of Canada. *The contract we think involved interstate commerce, and if so the*

> *federal statute is applicable* and the case will be treated on that basis.
>
> * * *
>
> Section 1747e, Stats. of Wisconsin, is a copy of the federal statute, except that it *applies to attempts to monopolize trade and commerce within the state*. . . .

Id. at 615, 625 (emphasis added). After remand for further proceedings, the case reached the Wisconsin Supreme Court again in *Pulp Wood Co.* v. *Green Bay Paper & Fiber Co.,* 168 Wis. 400, 170 N.W. 230 (1919), at which time the Court summarized its previous holding:

> [T]he principles of law then laid down . . . may be briefly stated as follows. . . . The contract in question involved *interstate* commerce and *hence* the federal statute is *the* statute to be applied to the case. . . .

168 Wis. at 404 (emphasis added). Our antitrust act applies only to intrastate commerce.

Olstad, however, makes much of the Court's remark in both cases that "little difference" could be observed regardless of which statute was applied. Pl. Br. at 16. This observation merely recognizes, of course, that the Wisconsin statute "is a copy of the federal statute except that it applies to attempts to monopolize trade and commerce within the state," *Pulp Wood*, 157 Wis. at 625, and is to be interpreted

consistent with federal law. *See, e.g., Grams*, 97 Wis. 2d at 346 (stating that under the Wisconsin statute "the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act"). It does nothing to undermine the Court's clear holding in *Pulp Wood* that our antitrust act applies only to intrastate commerce, as repeatedly confirmed by our appellate courts and, indeed, by the Wisconsin Supreme Court itself less than two months ago. *See* pp. 4-5 *supra*.

3. *Pulp Wood* Is Still Good Law.

Olstad next argues that even if *Pulp Wood* means what it plainly says, it is no longer good law. This is also incorrect.

a. *Pulp Wood* Was Not Overruled in the 1960s.

Olstad first argues that *Pulp Wood* was overruled by two cases from the 1960s: *State* v. *Allied Chemical & Dye Corp.*, 9 Wis. 2d 298, 101 N.W. 2d 133 (1960), and *State* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1 (1966). But far from repudiating *Pulp Wood*, both cases in fact confirm its holding.

In *Allied Chemical*, the State of Wisconsin alleged that defendants had "combin[ed] and conspir[ed] in restraint of

trade and in establishing uniform prices at which [calcium chloride was] sold to Milwaukee County and other users thereof in Wisconsin." 9 Wis. 2d at 291. Importantly -- and unlike Olstad's complaint -- the complaint in *Allied Chemical* further alleged "that some of the acts by the defendant in furthering said combination and conspiracy *were performed by them in the State of Wisconsin.*" *Id.* (emphasis added). Nonetheless, the trial court granted the defendants' motion for summary judgment on federal preemption grounds, agreeing that "since the Federal Trade Commission has taken jurisdiction over practices which the state by this action seeks to deal with, the state is precluded from enforcing the state statutes." *Id.* at 293.

The Wisconsin Supreme Court reversed, holding that federal law did not preempt the application of Wisconsin's antitrust act. *Id.* at 295. Significantly, the Court invoked *Pulp Wood*'s holding, stating that "[t]he Wisconsin [antitrust] statutes make no attempt to regulate or burden interstate commerce." *Id.* Having held that federal preemption was inapplicable, the Court further held that "if the state is able to prove the allegations made in its complaint" -- including that "some of the acts of the defendants . . . *were performed by*

them in the State of Wisconsin" -- then "[t]he people of Wisconsin are entitled to the advantages that flow from the protections provided by the Wisconsin antitrust statute." *Id.* (emphasis added).

The other case -- *Milwaukee Braves* -- never even commented on, let alone overruled, the holding of *Pulp Wood*. Like *Allied Chemical*, *Milwaukee Braves* was a case about federal preemption. The holding there was that, to the extent that Wisconsin's antitrust act might otherwise reach conduct by major league baseball, the state act is preempted by federal law that affords baseball an exemption from antitrust laws generally. 31 Wis. 2d at 730-32. The Wisconsin Supreme Court never reached the issue of whether the defendants' conduct violated Wisconsin's antitrust act, stating only that "we *assume*, at this point, that violation of Wisconsin law has occurred *if our law can be applied*." *Id.* at 719 (emphasis added). Moreover, in *Milwaukee Braves*, unlike here, some of the allegedly wrongful conduct took place in Wisconsin given the allegation that the defendants formulated and carried out "a plan" to abolish "the playing of Major League baseball games in Milwaukee." *Id.* at 708; *accord id.* at 713, 720 (noting that defendants' conduct "has

for thirteen years *reached into Wisconsin*" and "involves activity within Wisconsin") (emphasis added).[3]

Indeed, even after the *Allied Chemical* decision in 1960 and the *Milwaukee Braves* decision in 1966, our courts -- and, indeed, this Court -- have continued to recognize the principle that our antitrust act does not reach purely interstate conduct. *Conley Publishing,* 2003 WI 119, ¶ 16; *Grams*, 97 Wis. 2d at 346; *John Mohr & Sons, Inc.*, 55 Wis. 2d at 410; *Reese*, 45 Wis. 2d at 532; *American Medical Transport, Inc.*, 148 Wis. 2d at 299; *Independent Milk Producers Co-Op.*, 102 Wis. 2d at 6-7. These six decisions

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[3] Olstad argues that preemption could not have been at issue in *Allied Chemical* or *Milwaukee Braves* unless the Court had already presumed that Wisconsin's antitrust act applied to out-of-state conduct with predominantly interstate effects. Olstad has it backwards. Typically, it is when the federal government regulates intrastate activity -- activity that is otherwise squarely within the province of state police power -- that the possibility of federal-state conflict arises and the doctrine of preemption is implicated. "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade* v. *National Solid Waste Management Association*, 505 U.S. 88, 108 (1992) (citations omitted). It is clearly within a state's acknowledged police powers to proscribe anticompetitive behavior that takes place within its borders. *See, e.g., Allied Chemical*, 9 Wis. 2d at 295 (stating that "[t]he Wisconsin statutes were enacted in the exercise of the police powers of the state").

cannot be reconciled with the notion that *Allied Chemical* or *Milwaukee Braves sub silentio* overruled or modified the holding of *Pulp Wood*.[4]

b. The 1980 Amendments Did Not Overrule *Pulp Wood*.

Having argued that *Pulp Wood* was overruled in the 1960s by *Allied Chemical* and *Milwaukee Braves*, Olstad proceeds to argue that it was then repealed by the 1980 amendments to Wisconsin's antitrust act. Pl. Br. at 5. But even the *Emergency One* court -- which "reviewed the entire Legislative Council bill file for 1989 Assembly Bill 831[,] eventually passed as the amended Chapter 133, with some

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[4] The infirmities that attend Olstad's misreading of *Allied Chemical* and *Milwaukee Braves* are not remedied by his invocation of *Emergency One, Inc.* v. *Waterous Co., Inc.*, 23 F. Supp. 2d 959 (E.D. Wis. 1998), a case in which a federal district court similarly misread Wisconsin authority. The federal district court's lengthy discussion in *Emergency One* of how it would choose a standard for applying Wisconsin's antitrust act -- and Olstad's lengthy review of that discussion in his brief -- are beside the point. In the Wisconsin cases that have actually applied Wisconsin's antitrust act, the challenged conduct occurred or was alleged to have occurred in Wisconsin. *See, e.g., Conley Publishing*, 2003 WI 119; *Grams*, 97 Wis. 2d 332; *John Mohr & Sons, Inc.*, 55 Wis. 2d 402; *Reese*, 45 Wis. 2d 526; *American Medical Transport*, 148 Wis. 2d 294; *Independent Milk Producers Co-op*, 102 Wis. 2d 1; *Allied Chemical*, 9 Wis. 2d 290. Any "standard" that ignores this fact does not represent Wisconsin law.

changes" -- rejected the argument that the 1980 amendments were intended to expand the reach of the act. *Emergency One, Inc.*, 23 F. Supp. 2d at 963-64. And, again, *Conley Publishing*, *Grams* and *American Medical Transport.* -- all of which were decided after the effective date of the 1980 amendments -- have implicitly rejected this argument.

Indeed, neither the text of the 1980 amendments nor their legislative history even mentions *Pulp Wood*, let alone evinces any intent to overturn the Supreme Court's longstanding interpretation of our antitrust act. If the legislature had intended such a fundamental change to established law, that intent would have been expressly stated. *Guse* v. *A.O. Smith Corp.*, 280 Wis. 403, 406, 51 N.W. 2d 24, 26 (1952) (stating that "revisions of statues do not change their meaning unless the intent to change the meaning necessarily and irresistibly follows from the changed language"); *see also Pierce* v. *Underwood*, 487 U.S. 552, 567-68 (1988) (rejecting proposed change in interpretation of statute where a subsequent congressional amendment failed expressly to adopt a change because "only the clearest

indication of congressional command would persuade us to adopt a test so out of accord with prior usage").[5]

Here, however, the text of the 1980 amendments makes no change to the act's basic prohibition, thus compelling the conclusion that our Legislature did not intend to alter the long-standing interpretation of the statute. *See Tucker* v. *Marcus*, 142 Wis. 2d 425, 434, 418 N.W. 2d 818, 821 (1988) (stating that "there is a presumption that where the legislature substantially reenacts a statute, it adopts [the] construction previously placed on the statute. . . ."); *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978) (stating that legislature is presumed to have incorporated the judicial gloss on unamended portions of otherwise amended statute). Moreover, the Wisconsin Legislative Reference Bureau's analysis of the 1980 amendments, which details the changes that *were* intended by the legislation, never even mentions *Pulp Wood* nor suggests any intent to broaden the scope of

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5 For example, when the Illinois legislature decided to overrule case law holding that Illinois's antitrust act applied only to intrastate commerce, it did so by passing a bill expressly providing that "[n]o action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce." 740 Ill. Comp. Stat. 10/7.9 (2002).

Wisconsin's antitrust act to reach out-of-state conduct that primarily affects interstate commerce.

Finally, in light of our appellate courts' continued adherence to long-standing precedent and the total absence of any reference to that precedent in either the text or legislative history of the 1980 amendments, it is not possible to read the rejection of *Pulp Wood* and its progeny into either the *Illinois Brick* repealer or the vaguely worded statement of legislative intent included with the 1980 amendments.

In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the United States Supreme Court held that the federal antitrust laws do not allow recovery by indirect purchasers. Since Wisconsin appellate decisions direct Wisconsin judges to look to federal decisions for guidance in interpreting Wisconsin's antitrust act, our Legislature was concerned that *Illinois Brick* would deny indirect purchaser victims of *intra*state anticompetitive activity a cause of action under state law. To avoid this, the Legislature included an *Illinois Brick* "repealer" as part of the 1980 amendments to Chapter 133. The "repealer" consists of the three words -- "directly or indirectly" -- in Wis. Stat. § 131.18(1)(a).

Nothing about this repealer affects *Pulp Wood*. To the contrary, the repealer provided Wisconsin indirect purchasers a cause of action for unlawful *intra*state conduct, *see*, *e.g.*, *Obstetrical & Gynecological Associates* v. *Landig*, 129 Wis. 2d 362, 371, 384 N.W. 2d 719, 723-24 (1986), but did nothing more. Indeed, the fact that the Legislature expressly circumvented *Illinois Brick* only underscores the significance of its silence with respect to *Pulp Wood*.

Olstad argues that it would have made no sense to enact an *Illinois Brick* repealer without vastly expanding the jurisdictional reach of Wisconsin's antitrust act. This is incorrect. *First*, it is not the case that Wisconsin's *Illinois Brick* repealer would be a "dead letter" unless interpreted to reach conduct that occurs exclusively outside Wisconsin and that predominantly affects interstate commerce. Indeed, the seven Wisconsin cases that Microsoft has cited above (at pp. 4-5) -- including the *Conley Publishing* case from earlier this year -- all involved plaintiffs who were able to seek relief under the Wisconsin statute despite its limitation to *intra*state conduct.

Second, it was eminently reasonable for the Legislature, when it enacted the repealer, not to extend its

reach to interstate conduct and, thus, conduct that is also subject to federal antitrust law. If the Legislature had so extended the reach of our antitrust act, then defendants would have been exposed to the prospect of multiple liability. Specifically, defendants would have faced liability under federal antitrust law to direct purchasers for the full amount of an alleged overcharge and would have also faced liability under state law to downstream indirect purchasers for the very same alleged overcharge. This is because under federal antitrust law, except in the rarest of circumstances, a defendant sued by direct purchasers may not, as a matter of law, attempt to prove that the direct purchasers' damages should be reduced to reflect the fact that they have successfully passed the overcharges onto direct purchasers. *Illinois Brick*, 431 U.S. at 730. The defendant remains liable to the direct purchasers for the full amount of the overcharge -- even if indirect purchasers permitted to proceed under state law could later prove that all of the overcharge was passed on to them and, thus, recovered on that same overcharge. This is precisely the situation Microsoft would be facing if the Legislature had extended the reach of our antitrust act. At the same time that indirect purchasers such as Olstad are suing

Microsoft under state law, direct purchasers are suing Microsoft under federal law for the very same alleged overcharge. By continuing to adhere to *Pulp Wood*, the Legislature minimized this potential for double liability.

As for the statement of legislative intent included with the 1980 amendments, courts have emphasized that similar language in earlier versions of our antitrust act did not extend the act beyond its intended scope: "While § 133.27 provides that §§ 133.17 and 133.185 shall be liberally construed so that their purposes may be subserved, that does not mean that a remedy, not provided in the statutes, will necessarily be read into them." *Chapiewsky* v. *G. Heileman Brewing Co.*, 297 F. Supp. 33, 40 (W.D. Wis. 1968). Indeed, the Wisconsin Supreme Court recently characterized this language as nothing more than "hortatory statements" that "offer little help" in determining the scope of the antitrust act. *Conley Publishing*, 2003 WI 119, ¶ 24.

4. *Pulp Wood* Has Not Otherwise Been Overruled.

a. The Evolution of Federal Commerce Clause Jurisprudence Is Irrelevant.

Olstad also argues that changes in how the Commerce Clause of the United States Constitution has been interpreted have somehow nullified *Pulp Wood*'s holding. Pl. Br. at 24. This argument is also unavailing.

Olstad states that "[t]he *Pulp Wood* case is one of those early state cases that were decided when the dichotomy between intrastate and interstate was clear." Pl. Br. at 24. True -- but the fact that federal constitutional law of the early twentieth century would not permit a state to regulate interstate commerce only reinforces that the Wisconsin Supreme Court meant what it said in *Pulp Wood*: federal antitrust law governs *inter*state transactions and Wisconsin antitrust law reaches only *intra*state transactions. Thus, at the same time that *Pulp Wood* was decided, other state courts reached similar conclusions about their own antitrust statutes. *See, e.g.*, *Standard Oil Co. of Kentucky* v. *State ex rel. Attorney General*, 65 So. 468, 470-71 (Miss. 1914) ("[A] conspiracy to monopolize trade in any commodity to be

punishable under state laws must have as one of its objects a monopoly in the intrastate trade therein to be accomplished in part at least by transactions which are also wholly intrastate.").

Indeed, this is the very reason that Congress enacted the Sherman Act, without which anticompetitive conduct that crossed state lines would not have been subject to regulation. Senator Sherman explained as much in the Congressional debates preceding the enactment of the Sherman Act in 1890:

> [The Sherman Act] does not announce a new principal of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State of the Union are now, by common or statute law, null and void. Each State can and does prevent and control combinations *within the limit of the State*. This we do not propose to interfere with. The power of the State courts has been repeatedly exercised to set such combinations as I shall hereafter show, *but these courts are limited in the jurisdiction to the State*, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.
>
> * * *
>
> The State courts have held in many cases that they can not [sic] interfere in controlling the action of corporations of other States. If corporations from other States do business within a State, the courts may control their action *within the limits of the State*, but when a

> trust is created by a combination of many corporations from many States, there are no courts with jurisdiction broad enough to deal with them except the courts of the United States.

21 Cong. Rec. 2456, 2460 (1890) (emphasis added).

When federal constitutional law changed thereafter, that change did not retroactively modify the holding of *Pulp Wood* or alter the scope of Wisconsin law. Only the Wisconsin Supreme Court or the Wisconsin Legislature may do so, and neither has. *Cf. In re Microsoft Corp. Antitrust Litigation*, MDL No. 1332 (D. Md. Aug. 22, 2003) ("[T]he issue presented in this case is not whether *today* the State of Mississippi could constitutionally enact legislation that prohibits interstate anticompetitive conduct affecting intrastate commerce within Mississippi, regardless of how and where the means of effecting the illegal conduct are carried out. The issue is whether the legislature intended to do so *when it enacted the MAA*.") (emphasis added).

In re Brand Name Prescription Drugs Antitrust Litigation, 23 F. 3d 599 (7th Cir. 1997) is of no help to Olstad. There, the Seventh Circuit relied on the changing interpretation of the Commerce Clause to construe Alabama's antitrust statute as reaching interstate commerce. Pl. Br. at

15. But Olstad fails to mention that the Alabama Supreme Court rejected the Seventh Circuit's interpretation just two years later, noting (1) that the changing interpretation of the Commerce Clause does not warrant change in a judicial interpretation of a state antitrust statute that predates the change in Commerce Clause interpretation; and (2) that it is up to the legislature to make such a change:

> [T]he field of operations of Alabama's antitrust statute . . . is no greater today than it was when the laws were first enacted. Thus, these statutes regulate monopolistic activities that occur "within the state" -- within the geographic boundaries of this state -- even if such activities fall within the scope of the Commerce Clause of the Constitution of the United States. We leave to the Legislature the policy decision of whether to expand the reach of Alabama's antitrust statutes to activities that cross state boundaries.

Archer Daniels Midland Co. v. *Seven-Up Bottling Co.*, 746 So. 2d 966, 989-90 (Ala. 1999).

Moreover, Olstad's Commerce Clause argument entirely ignores the fact that there have been six Wisconsin appellate decisions confirming *Pulp Wood* since 1970, long after the federal courts began to reinterpret the Commerce Clause's scope. The argument also ignores the decisions of other courts that also uphold *intra*state limitations on state

antitrust laws, which were enacted contemporaneously with Wisconsin's. *See, e.g.*, *Arnold* v. *Microsoft Corp.*, No. 00-CI-00123, at 12-13 (Ky. Cir. Ct. July 21, 2000), *aff'd on other grounds*, No. 2000-CA-002144-MR (Ky. Ct. App. Nov. 21, 2001); *Abbott Laboratories* v. *Durrett*, 746 So. 2d 316, 338-339 (Ala. 1999); *In re Microsoft Corp. Antitrust Litigation*, MDL No. 1332 (D. Md. Aug. 22, 2003); *Vendo Co.* v. *Stoner*, 245 N.E. 2d 263, 281 (Ill. App. Ct. 1969). Thus, changes in the interpretation of the Commerce Clause in the years since *Pulp Wood* plainly have not altered its meaning.

b. A Federal Court's Construction of Wisconsin's Antitrust Act Is Not Binding Here.

In 1998, the United States Department of Justice and a number of state attorneys general, including Wisconsin's, brought antitrust claims against Microsoft in federal court. *United States* v. *Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part*, and *remanded in part,* 253 F. 3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001), *opinion on remand and final judgment sub nom. New York* v. *Microsoft Corp.*, 224 F. Supp. 76 (D.D.C. 2002) (appeal pending) ("government action"). Olstad argues that the U.S.

District Court in the District of Columbia determined in that action that Microsoft had violated Wisconsin's antitrust act and that the trial court here erred by failing to give preclusive effect to that determination.

The federal court's decision did not preclude the trial court from dismissing Olstad's complaint. *First*, a federal court's decision as to the jurisdictional reach of Wisconsin's antitrust act is not binding on Wisconsin courts. *Second*, in the government action, because the Wisconsin attorney general explicitly sought the same remedy as did the Department of Justice under federal law, Microsoft did not have sufficient incentive to litigate the construction of Wisconsin's antitrust act such that the federal court's decision on this issue should be entitled to preclusive effect. *Third*, in any event, the issue decided in the federal action was not identical to the issue that the trial court decided in dismissing Olstad's complaint.

(i) A Federal Court's Construction of Wisconsin's Antitrust Act Is Not Binding On a Wisconsin Court.

It is well-settled that a federal court's interpretation of Wisconsin law is not binding on Wisconsin courts. *Harvest*

States Cooperatives v. *Anderson*, 217 Wis. 2d 154, 161 n. 5, 577 N.W. 2d 381, 384 n. 5 (Ct. App. 1998) (citing *Daanen & Janssen, Inc.* v. *Cedarapids, Inc.*, 216 Wis. 2d 295, 400, 573 N.W. 2d 842, 844 (1988)). Accordingly, "[a] federal decision based on a federal construction of state law may not preclude reconstruction of the law by that state's own courts." 18 *Moore's Federal Practice* § 133.14[1] (3d ed. 2002); *see, e.g.*, *Kansas Public Employees Retirement System* v. *Reimer & Koger Associates, Inc.*, 941 P. 2d 1321, 1343 (Kan. 1997) (declining to preclude state court determination of state law issue that had been previously determined by a federal court and noting that "[a]ny suggestion that this Court is precluded from deciding a question of our state law is without merit"); *Green* v. *Santa Fe Industries, Inc.*, 514 N.E. 2d 105, 109 (N.Y. 1987) (stating that "applying res judicata here would result in imposing the Federal legal determination in a state court . . . [and] would not only foreclose the [defendants] from presenting their theory in a different forum; it would prevent our court from considering the applicable rule and performing our function as a court of law."). This principle applies with even more force here, where the federal court sits not in Wisconsin nor even in the Seventh Circuit and,

therefore, lacks any expertise in Wisconsin law. *Cf. Restatement (Second) of Judgments* § 28(3)(1982) ("[R]elitigation of the issue in a subsequent action between the parties is not precluded [where] . . . [a] new determination of the issue is warranted . . . by factors relating to the allocation of jurisdiction between [the two courts]. . . .").[6]

Moreover, a federal court's decision on state law is particularly undeserving of preclusive effect where, as here, the federal court's decision contradicts holdings of the state's own appellate courts. *Cf. Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund* v. *Century Motor Freight, Inc.*, 125 F. 3d 526, 519, 531-32 (7th Cir. 1997) (finding preclusion inappropriate because (1) the issue to be precluded was a "purely legal question," (2) all indications suggested that the court that issued the decision giving rise to preclusion -- the "first court" -- did not correctly

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[6] The Wisconsin Supreme Court and the state's other appellate courts have often relied upon the *Restatement (Second) of Judgments*, at times adopting its provisions wholesale. *See, e.g., Michelle T.* v. *Crozier*, 173 Wis. 2d 681, 688 n. 7, 689 n. 10, 495 N.W. 2d 327, 330 n. 7, 331 n. 10 (1993); *DePratt* v. *West Bend Mutual Insurance Co.*, 113 Wis. 2d 306, 311-12, 334 N.W. 2d 883, 886 (1983); *Portage County Bank* v. *Deist*, 159 Wis. 2d 793, 798-99, 464 N.W. 2d 856, 859 (Ct. App. 1999).

decide the issue, because the issue had not been "fully briefed in the first case," no court concurred with the first court, and the first court failed to distinguish contrary authority, and (3) the first court was not charged with the responsibility of developing the law in the jurisdiction).

Each of the factors relied upon in *Chicago Truck Drivers* applies to the federal decision to which Olstad argues the trial court should have given preclusive effect. Whether Wisconsin's antitrust act reaches out-of-state conduct that is predominantly interstate in its effects is "a purely legal question." The parties' briefing on this issue before the federal court was cursory and, for the reasons detailed elsewhere in this brief, the federal court's conclusion was flatly wrong. Notably, at a point in time when not a single Wisconsin appellate court had applied Wisconsin's antitrust act to interstate commerce, the federal court made no effort at all to distinguish *Pulp Wood* or its progeny. Finally, a federal district court is not charged with developing state law, but with interpreting it in accord with the state's highest court. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its

pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.").[7]

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[7] Beyond the general principle that "a federal construction of state law may not preclude reconstruction of the law by that state's own courts," 18 *Moore's Federal Practice* § 133.14[1], there are at least three reasons for not affording preclusive effect to a federal court's interpretation of state law where that interpretation bears indicia of being incorrect.

First, one of the primary rationales for issue preclusion is the "underlying confidence" that the first decision was "substantially correct." *Restatement (Second) of Judgments* § 29 cmt. f. But "[w]here a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. . . . That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary." *Id.*

Second, where just such a questionable determination of state law is rendered by a federal court, preclusion is particularly inappropriate because it would "foreclose[ ] [the state court] from an opportunity to reconsider the applicable rule, and thus to perform its function of developing law," a "consideration [that] is especially pertinent when there is a difference in the forums in which the two actions are to be determined." *Id.* at § 29 cmt. i.

Third, by reconsidering a federal court's erroneous interpretation of state law, our courts avoid the inequitable administration of the laws that would result from subjecting Microsoft to one interpretation of our antitrust act while all other antitrust defendants benefit from a differing interpretation. *Chicago Truck Drivers*, 125 F. 3d at 532 ("It would be manifestly unjust to apply one rule of law forever as between the parties and to apply a different rule as to all other persons."); *Restatement (Second) of*

(continued on next page)

(ii) Microsoft Had Little Incentive to Litigate the Reach of Wisconsin's Antitrust Act in the Government Action.

In the government action, the reach of Wisconsin's antitrust act was a collateral issue about which Microsoft had little incentive to litigate. Yet "among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had . . . an adequate incentive to litigate 'to the hilt' the issue in question." *Prosise* v. *Haring*, 667 F. 2d 1133, 1141 (7th Cir. 1981), *aff'd*, 462 U.S. 306 (1983); *see also Michelle T.*, 173 Wis. 2d at 688-89. In making this determination, courts consider the "realities of the prior litigation, including the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." *In re Sokol*, 113 F. 2d 303, 307 (2d Cir. 1997)

Judgments § 28(2)(b) ("[R]elitigation of the issue . . . is not precluded [where] . . . [t]he issue is one of law and . . . a new determination is warranted in order . . . to avoid an inequitable administration of the laws."); *id.* at § 28 cmt. c ("[T]he outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards.").

(alterations and quotation marks omitted); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4421, at 542 (2d ed. 2002) (no preclusion where "the matters had 'come under consideration only collaterally or incidentally'").

In the government action, there was no incentive to litigate "to the hilt" the reach of Wisconsin's antitrust act because there were no private Wisconsin plaintiffs seeking damages and because federal law, by itself, provided all of the relief that the government plaintiffs sought. *Cf. Firsdon* v. *United States*, 95 F. 3d 444, 448 (6th Cir. 1996) (declining to apply collateral estoppel to an issue that would not have affected the final remedy available in the first action). Indeed, the D.C. District Court emphasized that "[t]he plaintiff states concede that their laws do not condemn any act proved in the case that fails to warrant liability under the Sherman Act," *Microsoft Corp.*, 87 F. Supp. 2d at 55, and thus state law added nothing to the scope of liability. Moreover, the prospects of divestiture and other structural remedies sought by the government plaintiffs overwhelmed all other considerations and created a disincentive to expend resources in a trial on the intricacies of the antitrust laws of the District of Columbia and the eighteen states that joined

the Department of Justice in the government action when the scope of federal law was treated as controlling by all parties. *See Evergreens* v. *Nunan*, 141 F. 2d 927, 929 (2d Cir. 1994) (explaining that collateral estoppel is improper when the "stake in the first suit may have been too small to justify great trouble in its prosecution or defense").

That the scope of Wisconsin's antitrust act was collateral to the government action is evident by the fact that, out of hundreds of pages of briefing, the parties devoted only a few paragraphs to the reach of Wisconsin's antitrust act. *See Chicago Truck Drivers*, 125 F. 3d at 530 (holding that the briefing and analysis of a question of law was so "spars[e]" that it was "doubt[ful] that the issue was 'actually litigated' . . . , at least to the extent that it would be entitled to estoppel"). The federal court itself confirmed the collateral nature of the Wisconsin law claim, spending only one paragraph on the reach of the Wisconsin law. *Microsoft Corp.*, 87 F. Supp. 2d at 54-56. Thus, state law added nothing to the result either in the district court or on appeal, and the trial court was correct in not giving preclusive effect to the federal court's conclusion on an issue of Wisconsin law.

(iii) The Issue Decided in the Government Action Was Not Identical to the Issue Presented to the Trial Court.

Issue preclusion is appropriate only when the issue sought to be precluded is "identical" to that actually decided in the prior litigation. *May* v. *Tri-County Trails Commission*, 220 Wis. 2d 729, 734, 583 N.W. 2d 878, 880 (Ct. App. 1998); *see also Page K.B.* v. *Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W. 2d 370, 374 (1999) (stating that issue preclusion applies only to those issues that have been actually litigated and decided); *Northern States Power Co.* v. *Bugher*, 189 Wis. 2d 541, 550, 525 N.W. 2d 723, 727 (1995) (same). In the government action, the D.C. District Court nowhere addressed the issue of whether intrastate *conduct* is a required element of liability under Wisconsin's antitrust act. Instead, it focused on whether there were *effects* in Wisconsin caused by Microsoft's conduct outside Wisconsin: "Assuming that [Wisconsin] has, indeed, expressly limited the application of its antitrust laws to activity that has a significant, adverse *effect* on competition within the state or is otherwise contrary to state interests, that element is manifestly proven by the

facts presented here." *Microsoft Corp.*, 87 F. Supp. at 55 (emphasis altered).

The issue of intrastate *conduct*, however, involves a different element of liability under Wisconsin's antitrust act. This issue of the scope or situs of the allegedly anticompetitive conduct -- an issue entirely absent from the D.C. District Court's decision -- is crucial. Indeed, it was the basis on which the trial court granted summary judgment to Microsoft:

> The impact of those bad acts as found by Judge Jackson certainly was felt by anybody who purchased a Microsoft product of the type that was covered by Judge Jackson's decision, was felt by a person in Wisconsin. But the bad acts didn't occur here and I think they have to, to bring a claim under Wisconsin anti-trust law.

(R. 88 at p. 18; *see also* R. 88 at 5-6, 9-10.) Thus, because the issue actually decided in the government action was different from the dispositive legal issue articulated by the trial court, the trial court was correct in not applying collateral estoppel.

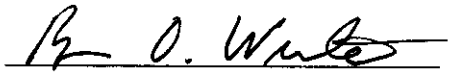
CONCLUSION

From *Pulp Wood* in 1914 through *Conley Publishing* in 2003, our courts have clearly stated that Wisconsin's antitrust act applies to *intra*state transactions only. Because Olstad's Amended Complaint alleges conduct by Microsoft *outside* Wisconsin with effects that were predominantly *inter*state in nature, the complaint failed to state an antitrust claim under Wisconsin law. Moreover, by his own admission, Olstad has suffered no injury as a consequence of Microsoft's allegedly anticompetitive conduct. The trial therefore court correctly granted summary judgment for Microsoft dismissing the Amended Complaint.

Dated this 29th day of August, 2003.

QUARLES & BRADY LLP

By:



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.50(1) and 809.19 (8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,817 words:

Dated this 29th day of August, 2003

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP. ANTITRUST LITIGATION	*	MDL 1332
This document relates to:	*	
JOHN ROBY	*	
v.	*	Civil No. JFM-03-741
MICROSOFT CORPORATION	*	
	*****	
MICHAEL LEWIS	*	
v.	*	Civil No. JFM-03-742
MICROSOFT CORPORATION	*	
	*****	
HENRY MASCAGNI	*	
v.	*	Civil No. JFM-03-743
MICROSOFT CORPORATION	*	
	*****	
HAYLEY J. GARDNER	*	
v.	*	Civil No. JFM-03-744
MICROSOFT CORPORATION	*	
	*****	
STEVE GRUBB	*	
v.	*	Civil No. JFM-03-745
MICROSOFT CORPORATION	*	
	*****	
LINDA STEWART	*	

	*	
v.	*	Civil No. JFM-03-746
	*	
MICROSOFT CORPORATION	*	
	*****	
MURLINE ADDINGTON	*	
	*	
v.	*	Civil No. JFM-03-747
	*	
MICROSOFT CORPORATION	*	
	*****	
TRAVIS D. McHANN	*	
	*	
v.	*	Civil No. JFM-03-748
	*	
MICROSOFT CORPORATION	*	
	*****	
BILLY LEWIS *		
	*	
v.	*	Civil No. JFM-03-749
	*	
MICROSOFT CORPORATION	*	
	*****	
BOOKER T. BAILEY *		
	*	
v.	*	Civil No. JFM-03-750
	*	
MICROSOFT CORPORATION	*	
	*****	
JAMES PIGG	*	
	*	
v.	*	Civil No. JFM-03-751
	*	
MICROSOFT CORPORATION	*	
	*****	
ANGELA BRINKLEY	*	
	*	
v.	*	Civil No. JFM-03-752
	*	
MICROSOFT CORPORATION	*	
	*****	

DELANIOUS HARRIED	*	
	*	
v.	*	Civil No. JFM-03-753
	*	
MICROSOFT CORPORATION	*	
	*****	
GERTRUDE GREEN	*	
	*	
v.	*	Civil No. JFM-03-754
	*	
MICROSOFT CORPORATION	*	
	*****	
CAMELIA CALVERT	*	
	*	
v.	*	Civil No. JFM-03-755
	*	
MICROSOFT CORPORATION	*	
	*****	
MARY WYATT	*	
	*	
v.	*	Civil No. JFM-03-756
	*	
MICROSOFT CORPORATION	*	
	*****	

MEMORANDUM

Plaintiffs John Roby, Michael Lewis, Henry Mascagni, Hayley J. Gardner, Steve Grubb, Linda Stewart, Murline Addington, Travis D. McHann, Billy Lewis, Booker T. Bailey, Jr., James Pigg, Angela Brinkley, Delanious Harried, Gertrude Green, Camelia Calvert, and Mary Wyatt have filed suit against Microsoft Corporation, alleging that they were overcharged for Microsoft software. Now pending before me are Microsoft's motions to dismiss plaintiffs' complaints.[1] For the reasons stated below, the motions will be granted.

[1]The motions in the cases of Grubb, Bailey, Brinkley, and Calvert are technically motions for judgment on the pleadings.

I.

These actions arise out of plaintiffs' purchases of computers containing Microsoft operating systems. Plaintiffs allege, based largely on the findings of fact in *United States v. Microsoft*, 84 F. Supp. 2d 9 (D.D.C. 1999), that Microsoft engaged in unfair, deceptive, and anticompetitive conduct designed to achieve and maintain alleged monopolies in the markets for personal computer operating software, word processing software, and spreadsheet software. According to plaintiffs, as a result of these alleged monopolies, Microsoft charged monopoly prices for its software and denied plaintiffs free choice in the competitive market as well as the benefits of software innovation. Based on these allegations, each plaintiff asserts a claim under the Mississippi Antitrust Act, Miss. Code Ann. § 75-21-3 ("MAA"). Each plaintiff also asserts a claim for civil conspiracy.[2]

II.

The MAA provides that any corporation that "monopolize[s] or attempt[s] to monopolize the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business" shall be deemed to be a prohibited "trust or combine" subject to liability as provided in the MAA. Miss. Code Ann. § 75-21-3.[3] Microsoft argues that the scope of this provision is limited to wholly intrastate conduct and that no wholly intrastate conduct is alleged by plaintiffs.

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[2]Plaintiffs initially asserted claims under the Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1 *et seq.* They now concede, however, that the Consumer Protection Act does not create a private right of action for claims based on anticompetitive conduct.

[3]The MAA was initially enacted in 1900. The language of the MAA remains almost entirely unchanged. (*See* Def.'s Tab 1.)

In *Standard Oil Co. of Kentucky v. State ex rel. Attorney Gen.*, 65 So. 468 (Miss. 1914), the Supreme Court of Mississippi addressed an alleged conspiracy between various oil companies to monopolize trade in petroleum throughout the United States. The defendant, who was allegedly allocated exclusive rights to sell petroleum products in Mississippi, moved to dismiss the complaint on the basis that the complaint alleged only conduct in interstate commerce that was beyond the reach of the Mississippi antitrust statute. In addressing the scope of the Mississippi antitrust statute, the Supreme Court of Mississippi explained:

> In the case at bar, if, with the intent to monopolize commerce in petroleum products throughout the United States, appellants had agreed to do and had actually done only such things as relate to that portion of the commerce therein which is interstate, they would have been punishable only under the laws of the general government, even though they intended to, and in fact did thereby, monopolize also that portion of the commerce therein that is wholly intrastate. In other words, a conspiracy to monopolize trade in any commodity to be punishable under state laws must have as one of its objects a monopoly in the intrastate trade therein *to be accomplished in part at least by transactions which are also wholly intrastate.*

Id. at 470-71 (emphasis added).

Standard Oil was based upon the "dual sovereignty" view of the Commerce Clause prevalent at the time the decision was rendered. That view was well articulated by the Supreme Court of the United States in *Addyston Pipe & Steel Co. v. United States*, a case relied upon the by the Mississippi Supreme Court in *Standard Oil*:

> Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate.

175 U.S. 211, 248 (1899).

In later years the Supreme Court's conceptual approach to the Commerce Clause changed, and the dual sovereignty doctrine became obsolete. *See N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937); *see also Cantor v. Detroit Edison Co.*, 428 U.S. 579, 632-37 (Stewart, J., dissenting) (discussing evolution of federal Commerce Clause jurisprudence with respect to the Sherman Act). However, the issue presented in this case is not whether today the State of Mississippi could constitutionally enact legislation that prohibits interstate anticompetitive conduct affecting intrastate commerce within Mississippi, regardless of how and where the means of effecting the illegal conduct are carried out. The issue is whether the legislature intended to do so when it enacted the MAA.

I am persuaded that it did not. The MAA was enacted one year after *Addyston Pipe* was decided and against the same conceptual background embodied in that decision. Of course, I recognize that it can be argued that the Mississippi legislature's true intent when enacting the MAA was to regulate commerce to the fullest extent permitted by the Constitution. However, plaintiffs have cited no legislative history to support that view, and the fact that the legislature has not amended the MAA since 1914 when *Standard Oil* was decided argues against such an interpretation of the legislative intent.[4]

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[4]Plaintiffs cite *Moore ex rel. State of Mississippi v. Abbott Labs.*, 900 F. Supp. 26 (S.D. Miss. 1995), for the proposition that the highest court in Mississippi has not determined whether "Mississippi antitrust law is limited to intrastate conspiracies." *Id.* at 32. That is true to the extent that *Standard Oil* found the MAA to be applicable to an illegal agreement that was both interstate and intrastate in nature and was accomplished at least in part by transactions that were wholly intrastate. In any event, *Moore* was a removal case which did not directly determine the scope of the MAA's coverage.

I also note that limiting state antitrust statutes to intrastate is consistent with the jurisprudence of

The question thus becomes whether plaintiffs have alleged at least *some* conduct by Microsoft which was performed wholly intrastate. In *Standard Oil*, the Mississippi Supreme Court found that there were sufficient allegations of such conduct because one of the objects of the alleged illegal conduct was "a monopoly of that portion of trade in petroleum products which lies wholly within the state of Mississippi, to be accomplished in part at least by transactions lying wholly within the state." 65 So. At 471. In the present case it can be inferred that plaintiffs allege that one of the objects of Microsoft's allegedly illegal conduct was to establish an unlawful monopoly in the relevant product markets within Mississippi. Plaintiffs have failed to allege, however, that this monopoly was to be accomplished by any transactions "lying wholly within the state." To the contrary, even after having been alerted to the criticality of the issue by Microsoft's motion to dismiss, plaintiffs make only the entirely conclusory averment that "Defendant Microsoft obviously created a monopoly in both interstate and intrastate commerce." (Pls.' Opp'n at 7.) This falls far short of the type of allegation that the Mississippi Supreme Court contemplated in *Standard Oil*.[5]

III.

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other states. For example, in *Arnold v. Microsoft Corp.*, No. 00-CI-00123, 2001 WL 193765 (Ky. Cir. Ct. July 21, 2000), *aff'd*, No. 2000-CA-002144-MR, 2001 WL 1835377 (Ky. T. App. 2001), *motion for review denied*, No. 2002-SC-0116-D (Ky. 2002), the court held that Kentucky's antitrust statute was limited to intrastate commerce. *Id.* at *9. The court noted:

> When a national company commits an anticompetitive act, it is certain to have at least some impact on at least one Kentucky resident. To use that as a means to bring a company's national or global operations under Kentucky law smacks of overreaching. This Court declines to do so.

Id.

[5]Because I am dismissing Plaintiffs' MAA claims, it is unnecessary for me to determine whether punitive damages are available under the MAA.

Microsoft also moves to dismiss plaintiffs' civil conspiracy claims. Under Mississippi law, a civil conspiracy claim cannot stand alone. It must reference an underlying tort. *Wells v. Shelter Gen'l Ins. Co.*, 217 F. Supp. 2d 744, 755 (S.D. Miss. 2002) (citing cases from numerous jurisdictions standing for the same proposition, *i.e.*, "absent the underlying tort, there can be no liability for civil conspiracy"). The only tort arising under Mississippi law referenced by plaintiffs is the asserted violation of the MAA which, for the reasons I have stated, is not viable.[6]

A separate order is being entered herewith.

Date: August 22, 2003

/s/
J. Frederick Motz
United States District Judge

[6]Plaintiffs seem to suggest that they may assert a civil conspiracy claim under Mississippi law based upon alleged violations of federal law and the laws of other states. They have not, however, cited any authority to support this far-reaching proposition and, absent such authority, I am not prepared to accept it.

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

JUDGE JUDITH E. McDONALD-BURKMAN

NO. 00-CI-00123

CAREY M. ARNOLD PLAINTIFFS

-and-

THOMAS C. HECTUS

v. **OPINION AND ORDER**

MICROSOFT CORPORATION DEFENDANT

* * * *

This matter is before the Court on Defendant Microsoft Corporation's ("Microsoft") Motion to Dismiss Plaintiffs' Complaint, pursuant to Rule 12.02(f) of the Kentucky Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. Defendant's motion states that relief should be granted because:

(i) Plaintiffs are not direct purchasers and thus lack standing to assert a claim for an alleged overcharge under KRS 367.170 and KRS 367.175;

(ii) KRS 367.170 does not apply to alleged abuses of monopoly power; and

(iii) KRS 367.175 does not apply to alleged monopolization in interstate commerce.

Plaintiff Carey M. Arnold purchased a Windows 98 Upgrade CD ROM disk from a third party vendor for $89.00. This disk was used to replace the existing Windows 95 operating system on her personal computer with the more modern Windows 98.

Plaintiff Thomas C. Hectus purchased a new Intel-based personal computer in which Windows 98 had been installed as the operating system by the original equipment

manufacturer (OEM). Mr. Hectus believed that at least $89.00 of the total purchase price of his computer was attributable to the presence of Windows 98 as the operating system.

Plaintiffs allege that Microsoft possessed a monopoly power in the market for operating systems for Intel-based personal computers, that Microsoft engaged in anti-competitive behavior and if not for its monopoly power and anti-competitive behavior Plaintiffs would have paid less for Windows 98. Plaintiffs seek damages and certification as a Class Action.

Plaintiffs seek relief based on KRS 367.170, Kentucky's "Consumer Protection Act" and KRS 367.175, Kentucky's version of the Sherman Antitrust Act, 15 U.S.C.S. §§ 1 and 2.

To prevail, Plaintiffs must have standing under either of the above two statutes and Plaintiffs must show that the Kentucky statutes cover indirect purchasers or, in the alternative, Plaintiffs are direct purchasers through the vehicle of the End User License Agreement (EULA, herein after "license") between Microsoft and Plaintiffs.

In considering Microsoft's Motion to Dismiss, the Court must construe the allegations of the Complaint in the light most favorable to the Plaintiffs. See Louisville v Stock Yards Bank & Trust 843 S.W. 2d 327, 328 (Ky. 1992). It is the Court's task to determine "whether the matters alleged in the complaint establish [the plaintiff's] standing to bring the action." Id. at 328.

KRS 367.175 is modeled after the Sherman Act. It is verbatim in all relevant aspects except that "among the several states" was replaced by "in this Commonwealth."

Plaintiffs did not purchase anything directly from Microsoft. No money passed directly from Plaintiffs to Defendant. Money flowed from the Plaintiffs to the Defendant via a circuitous route of distributors and vendors. While the parties involved in any given transaction could be readily ascertained, Plaintiffs seek to certify a broad class of parties that would involve many different manufacturers, distributors, third party vendors and others, each of whom would have either passed on Microsoft's alleged overcharge, absorbed part or all of it, or marked it up to their customer.

Defendant claims that only direct purchasers may bring a claim under KRS 367.175, and that given the similarity between the relevant parts of KRS 367.175 and the Sherman Act, Kentucky courts should look to federal cases construing the Sherman Act, namely Illinois Brick v Illinois, 431 U.S. 720 (1977). In Illinois Brick, the concrete block manufacturers (Defendants) engaged in price fixing. Defendants sold to masonry contractors (direct buyers) who sold to general contractors who sold to the State of Illinois (Plaintiff). Illinois paid the inflated price and sought to recover in this action. The trial court held for Defendant, the appellate court overturned and the Supreme Court overturned the appellate court. In a lengthy decision, the Supreme Court rejected any attempt at recovery by a party who was not the original purchaser.

Illinois Brick is not binding on this Court but a discussion is merited as to why this Court finds Illinois Brick persuasive.

The Supreme Court stated that antitrust laws were most effective when the initial (direct) purchaser could sue for full recovery without becoming involved with apportionment concerns. See Id. at 746. In fact, apportionment could reduce the recovery of the direct purchaser to such a small amount the there would be no incentive to litigate. Thus, the Supreme Court's position is that the direct purchaser has suffered the full injury. The Court specifically rejected allowing pass through overcharge victims from having a right of action. See Id. at 730, 736. The court was also concerned with pass-on theories that would create new dimensions of complexity involving multi-distribution levels and undermine the effectiveness of the antitrust laws. It specifically rejected pass-on theories for middlemen that resell goods without altering them (i.e. vendor for Plaintiff Arnold) and where the overcharge is purportedly passed on, such as where a price-fixed good is a small but vital input into a much larger product (i.e. OEM for Plaintiff Hectus), making the demand for the price-fixed good highly inelastic. See Id. at 743, 744.

There is language in Illinois Brick against trying to carve out exceptions even in rather meritorious circumstances. See Id. at 744.

Illinois Brick was revisited and upheld in the U.S. Supreme Court case, Kansas v Utilicorp, 497 U.S. 199 (1990). Here, suppliers violated antitrust laws by overcharging a utility for gas, which passed the overcharge on to its customers. The trial court, relying

on Illinois Brick, dismissed the State's claims. The appellate court affirmed, as did the Supreme Court. See Id. at 199. Kansas goes on at some length to affirm the key arguments in Illinois Brick.

In summary, the Supreme Court has clearly held that subsequent buyers have no right of action in seeking private remedies from Federal antitrust violations.

Plaintiffs make several arguments as to why Illinois Brick should not be followed. The first is that the direct buyers will never sue Microsoft. Given Microsoft's monopoly position in operating systems, it is simply too dangerous to bite the hand that could crush them by withholding Windows 98 or its successors. This argument is not persuasive. The direct buyers could sue Microsoft if they felt they were injured. Our courts are full of companies large and small suing large suppliers with whom they have ongoing and critical relations. Furthermore, this Court does not want to be in the position, now or in the future, of speculating which direct buyers might bring an action and for which indirect buyers it would be appropriate to "carve out" an exception to Illinois Brick.

The likelihood of Microsoft taking a retaliatory posture seems remote. In United States of America v Microsoft, 87 F. Supp.2d 30 (2000), the case that precipitated this action, the Final Judgment reads in part:

> 3a. OEM Relations.
>
> i. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that OEM:
>
> (1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or
>
> (2) to exercise any of the options or alternatives provided under this Final Judgment.

Second, Plaintiffs present a statutory construction argument. They argue the adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording. KRS 367.175, passed in 1976, adopts the exact wording of the relevant portions of the Sherman Act. But Illinois Brick was decided in 1977. Prior to Illinois Brick, Plaintiffs claim indirect purchasers were entitled to recover under the Sherman Act. Therefore, Plaintiffs conclude, the pre-1977 statute enacted in Kentucky adopted that meaning of the Sherman Act when indirect purchasers could recover.

The Court does not agree. First, Hanover Shoe v US Shoe Machinery Company, 392 U.S. 481 (1968) was the precedent that the court in Illinois Brick relied upon and affirmed. It predated KRS 367.175. In Hanover Shoe, the plaintiff was the direct purchaser and the defendant tried to assert the defense that the plaintiff passed on the overcharge to the indirect purchasers and thus had no cause of action. Illinois Brick was the reverse situation but the Court opined at length that the two situations are indistinguishable variations of the same issue and must be decided in harmony. Illinois Brick is an affirmation of the 1968 interpretation in Hanover Shoe that the Sherman Act applies to direct purchasers only. Second, the Kentucky legislature had two decades to amend KRS 367.175 if it felt that the meaning of the law it wrote in 1976 had changed following Illinois Brick. Finally, Kentucky courts interpreting Kentucky statutes patterned on federal law often exercise the option of relying on federal precedent decided after the adoption of the Kentucky law.

Plaintiffs ask this court to carve out an exception to Illinois Brick and allow indirect victims to sue in antitrust cases. To do so would be an infringement of legislative prerogative. Sixteen states now allow this, but authority comes from legislation. [The sixteen states are: Alabama, California, Hawaii, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, New Mexico, North Carolina, Rhode Island, South Dakota, Washington and Wisconsin.] The Kentucky legislature could have created legislation covering indirect purchasers. It did not. This Court would be acting as a de facto legislative body, a role reserved for egregious situations where legislatures fail to act and courts are forced to step in. Anticompetitive acts performed largely or totally out of state, against third parties, causing injury to Kentucky residents (assumed to have

occurred for purposes of this motion), do not warrant such judicial intervention. This court adopts the holding of Illinois Brick and rules that indirect purchaser have no standing under KRS 367.175.

Plaintiffs next postulate that the parties are in privity by virtue of the licensing and warranty agreements, and as such, they are direct buyers. If true, then the Court's posture on Illinois Brick would be irrelevant. The Court, however, finds no such link.

When an end user runs Windows 98 for the first time, an End-User License Agreement appears on the screen. The end-user (Plaintiffs) must accept the terms or the software will not run.

The Microsoft End-User License Agreement (EULA) states in part:

> *This Microsoft End-User License Agreement is a legal document between you . . . and Microsoft Corporation . . . .*
>
> *The software product is licensed, not sold.*
>
> *You may install and use one copy of the SOFTWARE PRODUCT on a single computer.*
>
> *A license for the SOFTWARE PRODUCT may not be shared or used concurrently on different Computers.*
>
> *You may not rent, lease or lend the SOFTWARE PRODUCT.*
>
> *Without prejudice to any other rights, Microsoft may terminate this EULA if you fail to comply with the terms and conditions of this EULA. In such event, you must destroy all copies of the SOFTWARE PRODUCT and all of its component parts.*
>
> *Microsoft warrants that (a) the SOFTWARE PRODUCT will perform . . . (b) Microsoft support engineers will make commercially reasonable efforts to solve any problem.*
>
> *Microsoft's and its suppliers' entire liability and your exclusive remedy shall be at Microsoft's option . . . .*

Plaintiffs state that, "Plaintiffs and all members of the Class are therefore in *direct* privity with Microsoft. Plaintiffs and the members of the Class: (1) have contracted

directly with Microsoft; (2) are subject to Microsoft's *direct* control in all aspects of their use of Windows 98; (3) have received a *direct* warranty from Microsoft as to Windows 98; and (4) are subject to Microsoft's *direct* control regarding their remedies for breach of warranty."

Accordingly, Plaintiffs and the members of the Class claim they are not in any sense indirect purchasers within the meaning of Illinois Brick.

Before analysis of this issue, a review of the purpose and effect of Microsoft's licensing scheme as postulated by Plaintiffs is warranted.

"Under the federal copyright law, the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. This is known as the 'first sale doctrine.' Under that doctrine, if Microsoft were to sell copies of Windows 98 to any person or entity, those sales would terminate Microsoft's authority to restrict sale or rental of those copies." (Pls.' Mem. Opp'n Def.'s Mot. Dismiss at 27.) The consequence would be that after one copy of software were sold (as opposed to licensed) the buyer could now sell copies to anyone, (or just post it on the internet for free and legal downloading by the rest of the world).

"If Microsoft relinquished its copyright control of Windows 98 by selling copies, then Microsoft could not maintain its own monopoly pricing of Windows 98. . . . As to Windows 98, Microsoft's chain of distribution culminates with its EULA that directly binds consumers who use that software. The EULA is thus the culmination and an essential aspect of Microsoft's use of federal copyright law to prevent the erosion of its monopoly pricing of Windows 98." (Id. at 28.)

Plaintiffs concede that Microsoft is entitled to copyright protection but, because they are an unlawful monopolist, and because they used copyright law to protect that monopoly, their licensing scheme is subject to scrutiny. "If Microsoft were not an unlawful monopolist, its licensing scheme would not be open to question."

The Court is not distracted be the word "scheme." A scheme was once a plan or an idea. But the word has taken on a sinister overtone since its adoption in political circles. It is usually preceded by the word "risky."

Microsoft's licensing scheme is just a licensing agreement. It is similar to the licensing agreement all software manufacturers require and is a product of the wording of

federal copyright laws as opposed to a special contractual relationship that provides some unique benefit to Microsoft. The license agreement is merely a reiteration that in return for using Microsoft's copyrighted intellectual property, the user is not going to infringe on Microsoft's copyright. It is a license to use the product in perpetuity, in return for a single fixed payment. It is the functional equivalent of a sale. The license does not create a legal relationship where the parties are now in privity encompassing all of Microsoft's activities, nefarious or otherwise. Indeed, it would be hard to assess the scope of such a policy on other forms of licenses.

Plaintiffs warranty argument also fails. On the limited issue of a warranty giving rise to privity, it is common for manufacturers to provide warranties to end users even if they are far removed from a privity relationship. The manufacturer has liability for warranty claims but the Court does not believe that warranty liability creates privity. If this were a warranty claim, Plaintiffs would have standing under KRS 367.170.

Plaintiffs also point to a Kentucky case, State Farm v Reeder, 763 S.W.2d 116 Ky (1989) as "the most instructive case demonstrating the total irrelevance of Microsoft's privity argument under Kentucky law." This case gave an injured third party a right of private action against a tortfeasor's insurer for a violation of the Unfair Claims Settlement Practices Act. Even though there was no privity between the third party and the insurer, the Kentucky Supreme Court held that the third party belonged to "the class intended to be protected by the Insurance Code." The Court held that the third party, as a member of the class protected by the Insurance Code, had a private right of action against the insurer under KRS 446.070 and then held that the Insurance Code should be liberally construed. [KRS 446.070 states, "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such a violation."] The Supreme Court concluded that "private citizens are not specifically excluded by the [Insurance Code] from maintaining a private right of action against an insurer by third party claimants."

From this, Plaintiffs continue, "All of that reasoning is equally valid in this case. One need only substitute the names of the parties and the substantive statute involved here to see the dispositive force of the Supreme Court's holdings in Reeder."

The Court does not agree. Statutes are not fungible. Applying the reasoning or interpretation of one statute to another statute opens the door to potential judicial mischief. A creative judicial mind could skew an outcome to any end desired simply by finding a case with the correct sequence of legal logic and applying it to an existing statute that does not already directly address the issue. This Court declines to do so.

Furthermore, insurance law is quite different from antitrust law. While both may pit consumers against big companies, insurance claimants, especially third party claimants, are in an adversarial role with the insurance company (defendant). Here, no adversarial relationship exists. Plaintiffs are some form of customer of Defendant. Furthermore, courts have bent over backwards to favor insureds when up against insurance companies that use obtuse policy wording, abusive claims procedures or other heavy handed tactics against parties with otherwise legitimate claims. This special treatment of insureds does not automatically pass to other types of claimants.

For the reasons stated above, the Court finds that the Plaintiffs are not in privity with Microsoft. Combined with the Court's earlier finding that only direct buyers have standing under KRS 367.175, the Court determines that Plaintiffs have no standing under Kentucky's statute meant to deal with monopolistic practices, KRS 367.175.

The Court will now address the second claim in Microsoft's Motion to Dismiss, that Count I fails to state a claim under KRS 367.170 because that statute does not apply to purported abuses of monopoly power.

Some background may be helpful. Chapter 367 of the Kentucky Revised Statutes (KRS 367) is titled Consumer Protection. The first section of substance is KRS 367.170, titled "Unlawful Acts." It is a sweeping proclamation that on its surface appears capable of subsuming almost any type of allegation.

KRS 367.170 says:

> (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) For the purposes of this section, unfair shall be construed to mean unconscionable.

The Court does not believe that KRS 367.170 is the correct statute to bring a claim based on monopolistic practices. The Court also does not believe that KRS 367.170 was meant to be a vehicle for Class Action suits and declines to open such a sweepingly vague statute for use as a blunt instrument in a Class Action suit.

Plaintiffs opine that it is a jury question as to whether Microsoft's behavior was misleading, deceptive, unfair or unconscionable. The Court agrees that the characterization of Microsoft's behavior is a question of fact suitable for jury determination. But the question here is a question of law. Does KRS 367.170 apply to the instant parties? The sub-questions to answer are: 1) Is there privity; and 2) If there is no privity, does the valid warranty relationship pull the rest of Microsoft's behavior into the scope of KRS 367.170?

As ruled earlier, the Court finds no privity between the parties beyond the express terms of the warranty. For non-warranty purposes, there is no privity between the parties as related to any acts that may be covered by KRS 367.170. There was simply no contact between the parties. A plain reading of the statute would seem to mandate some interaction between the parties. Here, the claim is that the nefarious activity was directed against third parties resulting in eventual injury to Plaintiffs. Again, the Court will not expand the use of such a broad statute to indirect claimants.

As to the warranty issue, to take the valid warranty link and use it as a hook to pull all actions of Defendant under the purview of KRS 367.170 seems overreaching and unwarranted.

The Court also reviewed Skilcraft Sheetmetal v Kentucky Machinery, Inc., 836 S.W.2d 907 (Ky. Ct. App. 1992). Skilcraft, a warranty case where the issue was whether the warranty extended to subsequent buyers, may be distinguished on the facts. The underlying principles, however, are informative.

> A question of first impression in this jurisdiction is whether KRS 367.220, which provides a private right of action under the Consumer Protection Act, allows an action by a person who [*4] has not purchased or leased goods or services from the person he claims to have violated the Act. The

Consumer Protection Act is remedial legislation enacted to give consumers broad protection from illegal acts. Stevens v. Motorists Mut. Ins. Co., Ky., 759 S.W.2d 819, 821 (1988). To maintain an action alleging a violation of the Act, however, an individual must fit within the protected class of persons defined in KRS 367.220. This statute provides in pertinent part as follows:

Action for recovery of money or property--When action may be brought--(1) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170, may bring an action under the Rules of Civil Procedure in the circuit court in which the seller or lessor resides or has his principal place of business or is doing business, or in the circuit court in which the purchaser or lessee of goods or services resides, or where the transaction in question occurred, [*5] to recover actual damages.

From our reading this statute as a whole, we conclude a subsequent purchaser may not maintain an action against a seller with whom he did not deal or who made no warranty for the benefit of the subsequent purchaser. The language of the statute plainly contemplates an action by a purchaser against his immediate seller. This is abundantly clear from its venue provision which states the action may be filed "in the circuit court in which the seller or lessor resides or has his principal place of business." Further evidence of legislative intent is found in KRS 367.220(5), which provides that an action under the statute must be brought "within one (1) year after any action of the attorney general has been terminated or within two (2) years after the violation of KRS 367.170, whichever is later." This would seem to show a lack of concern for a subsequent purchaser who would often purchase used merchandise more than two years after the violation, as indeed was the case here. **The legislature intended that privity of contract exist between the parties in a suit alleging a violation of the Consumer Protection Act.** We find distinguishable situations such as that [*6] presented in Ford Motor Co. v. Mayes, Ky. App., 575 S.W.2d 480 (1978), where the defendant (Ford Motor Company) provides warranties to the ultimate purchaser to repair the item purchased.

The legislature had the option of enacting a statute which allows persons other than purchasers with privity of contract to bring an action under the Consumer Protection Act. For example, the current statute in Massachusetts provides a cause of action to "**any person** . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful . . . ." See Maillet v. ATF-Davidson Co., Inc., 407 Mass. 185, 552 N.E.2d 95, 98-99 (1990) (emphasis added). Prior to the 1979 amendment of the Massachusetts [*7] statute, it stated that

> "any person who purchases or leases goods . . . and thereby suffers any loss . . . as a result of the use or employment by another person of an unfair or deceptive act . . . may, as hereinafter provided, bring an action in the superior court . . . ." Mass. Gen. L. ch. 93A, 9 (1973). **This language was interpreted to require privity between the person alleging a deceptive trade practice and the defendant.** Maillet, 552 N.E.2d at 99; Dodd v. Commercial Union Insurance Co., 373 Mass. 72, 365 N.E.2d 802, 807 (1977).

Skilcraft Sheetmetal v Kentucky Machinery, Inc., 836 S.W.2d 907, 909 (Ky. Ct. App. 1992). (emphasis added).

This Court concludes that KRS 367.170 does not apply to claims based on monopolistic practices. Based on venue requirements and other language of KRS 367.220 (Any person who purchases or leases goods . . .), this Court also feels that KRS 367.170 was never meant to encompass class action litigants and further concludes that privity between parties is required to maintain an action under KRS 367.170.

This Court will now address the third claim in Microsoft's Motion to Dismiss, that Count II fails to state a claim under KRS 367.175 because that statute only applies to intrastate commerce, not interstate commerce. KRS 367.175 is Kentucky's version of the Sherman Antitrust Act.

KRS 367.175 states in part:

> (1) Every contract . . . or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.
>
> (2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

Microsoft's anticompetitive acts which were the focus of the Federal action did not take place in Kentucky. While Microsoft might have benefited from its anticompetitive acts by allowing its product to be offered for "sale" in Kentucky, the issue before the Court is whether KRS 367.175 only make acts within the Commonwealth illegal or does it make the results of such behavior illegal when it impacts a Kentucky resident?

Many of the companies against whom Microsoft engaged in anticompetitive behavior are national in scope. As such, it is likely that at least one has employees or operations within the Commonwealth. But there are no allegations that Microsoft's acts occurred within the Commonwealth. The question before the Court is how broadly to read KRS 367.175.

The Sherman Act applies to anticompetitive and predatory acts to maintain monopoly power in actions "among the several states." In other words, the parties must be in two separate states, interstate. KRS 367.175 applies to the same behavior but uses the phrase "in this Commonwealth." In other words, the parties must be in the same state, intrastate.

The legislature could have omitted the phrase "in this Commonwealth" as it did in the nearby KRS 367.170. Since it did not, this Court must give the phrase meaning. The obvious meaning is that the bad acts must have occurred in this Commonwealth. The Court adopts that view. The alternative is to read KRS 367.175 to mean that the effects of the bad acts must manifest themselves within the Commonwealth.

When a national company commits an anticompetitive act, it is certain to have at least some impact on at least one Kentucky resident. To use that as a means to bring a company's national or global operations under Kentucky law smacks of overreaching. This Court declines to do so. Kentucky State courts are not the appropriate venue.

This Court holds that KRS 367.175 requires that anticompetitive acts have a substantial nexus to Kentucky. Defendant's acts do not have a substantial nexus to Kentucky. Repercussions of such acts, such as higher prices, are not sufficient.

Having completed the analysis and dismissed both counts, the Court nevertheless feels compelled to look at the underlying substance of the case, namely the question, "Were the Plaintiffs injured?"

Plaintiffs' allege that Microsoft held a monopoly position in operating systems, that Microsoft engaged in illegal monopolistic activities and because of such actions, Plaintiffs paid too much for their operating systems. Specifically, one Plaintiff paid $89 for a Windows 98 Upgrade and the other Plaintiff attributes $89 of the cost of his new computer to the presence on Windows 98 as the operating system. Plaintiffs point to an

internal 1997 Microsoft study that said pricing Windows 98 at $49 would be profitable. From this Plaintiffs hint that if not for Microsoft's monopoly position, the price of Windows 98 would have been around $49. The $40 cost above $49 forms the basis for the relief sought.

This Court is not trying Microsoft for antitrust violations. Another court has already done so. That court, in an Order of June 7, 2000 said, "Following a full trial, Microsoft has been found guilty of antitrust violations . . . ." United States v Microsoft, 87 F. Supp.2d 30.

The real question before the Court is: "In a perfectly competitive environment, would Plaintiffs have paid less money for Windows 98 or a similarly capable operating system?"

Some preliminary observations are in order. Plaintiff Arnold, who upgraded her Windows 95 operating system to Windows 98, was not compelled to do business with Microsoft. There was no need to upgrade her computer unless she wanted to use an operating system that offered more benefits. She made a choice: 1) I want the benefits this product offers; and 2) I am willing to pay $89 for these benefits. Millions of people made the other choice and decided not to upgrade. The computers in this Court still run Windows 95. At the time this purchase was made, virtually all programs that ran under Windows 98 also ran under Windows 95. Microsoft was competing with its own older versions of Windows. Pricing was a conscious business decision factoring in cost at one end and what the market would bear at the other. In a theoretically fully competitive environment with some customers running Windows 95 and others running non-Microsoft operating systems, Microsoft's pricing decision would have been the same because the customers would always have had the choice not to buy the product.

Microsoft's illegal behavior was directed at business rivals. Microsoft's intent was either to drive them out of business or into obscurity, to wipe them out as rivals by incorporating features of their programs into the next version of Windows at no additional charge to the customer or by taking predatory pricing action to deter potential rivals from entering the operating system business.

At all times the Court must ask, "Who is being injured?"

> In essence, Microsoft mounted a deliberate assault upon entrepreneurial efforts that, left to rise or fall on their own merits, could well have enabled the introduction of competition into the market for Intel-compatible PC operating systems. United States v Microsoft, 87 F.Supp2d 30, 44.
>
> In fact, Microsoft has expended wealth and foresworn opportunities to realize more in a manner and to an extent that can only represent a rational investment if its purpose was to perpetuate the applications barrier to entry. Id. PP 136, 139-42. **Because Microsoft's business practices "would not be considered profit maximizing except for the expectation that . . . the entry of potential rivals" into the market for Intel-compatible PC operating systems will be "blocked or delayed," Neumann v. Reinforced Earth Co., 252 U.S. App. D.C. 11, 786 F.2d 424, 427 (D.C. Cir. 1986), Microsoft's campaign must be termed predatory.** Id at 44. (emphasis added).

Prior to the conclusion of United States v Microsoft, 87 F.Supp2d 30, Findings of Fact were issued on November 5, 1999. Portions are significant to the issues in the instant case and appear below. That Court was focused on Microsoft's anticompetitive behavior. This Court is focused on the question: "Did the customer suffer an immediate financial injury in acquiring Windows 98?"

> 61. The fact that Microsoft invests heavily in research and development does not evidence a lack of monopoly power. Indeed, Microsoft has incentives to innovate aggressively despite its monopoly power. First, if there are innovations that will make Intel-compatible PC systems attractive to more consumers, and those consumers less sensitive to the price of Windows, the innovations will translate into increased profits for Microsoft. Second, **although Microsoft could significantly restrict its investment in innovation and still not face a viable alternative to Windows for several years, it can push the emergence of competition even farther into the future by continuing to innovate aggressively.** While Microsoft may not be able to stave off all potential paradigm shifts [*52] through innovation, it can thwart some and delay others by improving its own products to the greater satisfaction of consumers. United States v Microsoft, 84 F.Supp.2d 9, 51 (emphasis added).
>
> 65. It is not possible with the available data to determine with any level of confidence whether the price that a profit-maximizing firm with monopoly power would charge for Windows 98 comports with the price that Microsoft actually charges. Even if it could be determined that Microsoft charges less than the profit-maximizing monopoly price,

though, that would not be probative of a lack of monopoly power, for Microsoft could be charging what seems like a low short-term price in order to maximize its profits in the future for reasons unrelated to underselling any incipient competitors. For instance, Microsoft could be **stimulating the growth of the market for Intel-compatible PC operating systems by keeping the price of Windows low today.** Given the size and stability of its market share, Microsoft stands to reap almost all of the future rewards if there are yet more consumers of Intel-compatible PC operating systems. **By pricing low relative to the short-run profit-maximizing price, thereby focusing on attracting new users to the Windows platform, Microsoft would also intensify the positive network effects that add to the impenetrability of the applications barrier to entry.** Id. at 53 (emphasis added).

In a classic monopoly, a business raises its price up to the point of diminishing return to maximize its revenue and profit. This forms the economic basis of injury claims in monopoly type cases. Microsoft's behavior was different.

A review of the operating system market under Windows 3.1, the forerunner of Windows 95 may prove helpful. Windows 3.1 was priced in the general range of $80 to $100. To increase functionality, a vast software industry developed selling Windows add-ons. Typical add-on programs would be screen savers, backup and recovery programs and disk defragmenters. To reach the consumer, each program needed to go through the retail distribution channel. The sum total for the whole package of programs would exceed the cost of the operating system several times over.

Microsoft has used its position to acquire many of these features for inclusion into Windows 98. Often, small companies had little choice but to license the software to Microsoft or just sell the program to Microsoft. In a truly competitive market, Microsoft would not have been able to swallow up so many other players or acquire their technology on such favorable terms.

Microsoft may have engaged in illegal monopolistic activity. But such findings are not an elixir of liability from whose cup all can drink.

In a competitive environment for operating systems, what would the Plaintiffs have paid for Windows 98 or something comparable? Assume the Plaintiffs' position and state that in an ideal environment, the operating system would sell for $49. (Note: the operating system was never priced that low in inflation adjusted dollars. The actual price of Windows 1.0 was over $100 in 1985). The $49 operating system would not have all

the features of Windows 98. We would have a fragmented market of operating system vendors and software add-on vendors. No company would have been big enough to consolidate the industry. The resulting cost to the consumer of a package of programs equal in function to Windows 98 would be substantially more than $89.

In other words, maybe Microsoft is ending up with more money in its corporate coffers than it should, but the consumer has not been injured. Microsoft's business rivals have been injured.

Plaintiffs may point to the fact that add-ons could be free. But free is not a business model. Software companies do give away programs hoping to bring in revenue through advertising that will be seen by the end-user. Such a model provides fodder for hypothetical legal arguments, but will not pass economic muster.

This court is aware of the pre-Microsoft fragmented market for operating systems in the 1970's. These systems ran what were known as mini-computers. Mini-computers were found in mid-sized businesses that were not big enough to run the "big iron" from IBM. These computers used a variety of operating systems such as CP/M, none of which were compatible with each other. Add-on software would work with one system but not another. It was not unusual for one piece of add-on software to render another inoperable. It was very expensive. Competition, normally the engine of price control, did not reduce the total outlay for the end-user.

Plaintiffs want to receive the fruits of Microsoft's behavior in the form of Windows 98 and all of its features. But the operating system that a truly competitive market would foster would be a less capable package. To claim that the non-monopoly price Microsoft should have charged was $49 and then ignore the point that a non-monopoly operating system market would have been a fragmented affair is invalid. The total cost to the consumer to buy a $49 Microsoft operating system plus even a few add-ons would be greater than the $89 Plaintiffs paid.

Plaintiffs may feel that Microsoft's behavior has inhibited others from entering the market. Maybe so. The essence of that behavior has been predatory pricing to keep potential rivals out. Plaintiffs are the beneficiaries, not the victims.

To postulate that such predatory action creates future injury is speculation, and not suitable for judicial remedy in this action.

In summary, Microsoft may have done wrong, but not to these Plaintiffs.

For the reasons stated above, it is hereby **ORDERED** and **ADJUDGED** Defendant Microsoft's Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted is **GRANTED** and Plaintiffs' Complaint is hereby **DISMISSED**, with prejudice.

This is a final and appealable Order, there being no just cause for delay.

ENTERED IN COURT

JUL 21 2000

TONY MILLER, CLERK
By _____ Deputy Clerk

Judith McDonald Burkman

JUDITH E. McDONALD-BURKMAN, JUDGE

7-21-00

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WISCONSIN COURT OF APPEALS
DISTRICT I

GENE L. OLSTAD,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

vs. Appeal No. 03-1086

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100, inclusive,

Defendants-Respondents.

Appeal taken from the Final Order of the Milwaukee County Circuit Court
The Honorable Jeffrey Kremers, Presiding
Circuit Court Case No. 00-CV-003042

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INTRODUCTION

In 1980, the Legislature amended Wisconsin's antitrust statutes to overrule federal antitrust limitations and extend to the citizens of Wisconsin the right to recover damages suffered as indirect purchasers and resulting from illegal monopolistic conduct. Microsoft argues that a case from 1916 precludes the exercise of Wisconsin's police power to regulate monopolies engaged in any interstate commerce.

Microsoft ignores the plain meaning of the statute. Acceptance of its position would obliterate the statutory scheme of the Legislature in the regulation of business, thereby eviscerating the protection that the Legislature afforded to Wisconsin citizens by the amendments of 1980.

ARGUMENT

I. MICROSOFT'S ARGUMENTS IGNORE THE ISSUE OF STATUTORY CONSTRUCTION.

Microsoft fails to address the fundamental issue presented in this appeal: Does the plain language of Wisconsin's antitrust statute, Wis. Stats. § 133.03(2), limit its application to wholly intrastate commerce? Indeed, § 133.03(2) is not even referenced in their table of authorities.

Instead, Microsoft relies exclusively on *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), arguing it interprets a prior antitrust statute and

apply that interpretation to the amended statute from 1980. In granting Microsoft's summary judgment motion below, the trial court made the same mistake, never once referring to the language of § 133.03(2), or its meaning.

The current § 133.03(2) provides, in relevant part:

> Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony . . .

No one disputes that this language is controlling. But Microsoft would have this Court interpret this prohibition as requiring that the defendant's actions must have occurred exclusively within the state, *i.e.*, that the commerce must be wholly intrastate.

Nothing in the language of the statute creates such a limitation.[1] With such unambiguous statutory language, one cannot go looking to other sources to impose a limitation that is not there. *See County of Walworth v. Spalding*, 111 Wis.2d 19, 24, 329 N.W.2d 925, 927 (1983).

II. EVEN IF ONE LOOKS TO LEGISLATIVE HISTORY, IT FURTHER SUPPORTS APPELLANT'S READING OF THE STATUTE.

Although the language of the statute is clear on its face, resort to the legislative history of the amended statute

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[1] Indeed, in the *Emergency One* case that both parties cited, Microsoft's counsel, Stuart Parsons, who represented the plaintiff in *Emergency One*, argued that the language of the statute was clear in that it was not limited to exclusively intrastate conduct. *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F. Supp.2d 959, 962-963 (E.D. Wis. 1998).

only reinforces that the Legislature intended to remove geographic limitations.

A. Removal Of "In This State" Limitation.

Pre-1980 versions of the antitrust statute consistently referred to monopolization of "any part of the trade or commerce **in this state**" (see former § 133.01). (Emphasis added). However, the 1980 amendments removed the "in this state" limitation. *See* Wis. Stats. § 133.03(2) (1980). This change, coupled with the Legislature's directive that the statutes "be interpreted in a manner which gives the most liberal construction to achieve the aim of competition" (Wis. Stats. § 133.01), clearly shows an intent to eliminate geographical limitations. Microsoft's counsel made precisely the same argument in the *Emergency One* case. *Emergency One*, 23 F. Supp.2d at 963.[2]

B. The Repealer Legislation Clearly Displays The Intent Of The Legislature To Extend Its Scope To Interstate Commerce.

The extension of remedies to indirect purchases strongly indicates the Legislature's intent to apply Wisconsin law to interstate commerce. The point of passing a repealer statute

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[2]Judge Adelman rejected this argument in *Emergency One*. But he did so because, in his opinion, the words "in this state" in the prior version of the law did not limit its application to wholly intrastate commerce, and so their removal was inconsequential to his analysis. *Emergency One*, 23 F. Supp.2d at 964.

was to give Wisconsin's citizens rights as indirect purchasers to seek damages caused them by illegal monopolies. If such a remedy is limited to wholly intrastate commercial enterprises, it is meaningless. For all practical purposes, there are no longer any wholly intrastate commercial enterprises with the ability to exert monopoly power. *See In Re Brand Name Prescription Drugs*, 123 F.3d 599, 613 (7th Cir. 1997). If the statute is limited as Microsoft suggests, the Legislature's repeal of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), would have been an academic exercise given the economic realities that existed at the time. An interpretation of a statute that would lead to an unreasonable or absurd result is to be avoided. *State v. Michels*, 141 Wis.2d 81, 88, 414 N.W.2d 311 (Ct.App. 1987).

Microsoft suggests the repealer statute may have been limited to intrastate commerce to avoid multiple liability. The U.S. Supreme Court rejected that same argument in the *ARC America* case, stating that there is no "federal policy against States imposing liability in addition to that imposed by federal law." *California v. ARC America Corp.*, 490 U.S. 93, 105 (1989). Moreover, the Legislature was not trying to protect illegal monopolies, such as Microsoft. The Legislature's stated purpose was "to safeguard the public

against the creation or perpetuation of monopolies . . ." Wis. Stats. § 133.01. State repealer statutes, such as Wisconsin's, work in conjunction with federal antitrust laws and "are consistent with . . . deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *ARC America*, 490 U.S. at 102.

Microsoft's "interpretation" would pervert the intent of the Legislature by giving monopolists involved in interstate commerce absolute immunity against indirect purchaser claims. There is no remedy under federal law, and they would be beyond the reach of state law.

Microsoft also argues that if the Legislature meant to overrule *Pulp Wood*, it would have done so expressly. That argument assumes that the Legislature interpreted *Pulp Wood* the same way Microsoft does. There is nothing in the legislative history to suggest that the Legislature even considered *Pulp Wood*, much less interpreted it as limiting the scope of the statute. The only case law reference in the legislative history is to "*Milwaukee Braves*"[3] which shows the legislative understanding that Wisconsin law applies to interstate commerce.

C. Appellant Does Not Advocate A Violation Of *Stare Decisis*.

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[3] *State v. Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1 (1966).

Microsoft suggests that Appellant is asking this Court to disregard *Pulp Wood*, and advocating a violation of *stare decisis*. Not so. *Pulp Wood* does not control here. First of all, *Pulp Wood* never interpreted the language of Wisconsin's current antitrust statute. If *Pulp Wood* placed any limitation on the statute's application, which Appellant disputes, it was a limitation based on then-existing constitutional constraints. See *Emergency One*, 23 F.Supp.2d at 965. Those constraints have since been removed, and Wisconsin's statute was then amended. So *Pulp Wood* would not apply in any event. See *State v. Lindell*, 2001 WI 108, ¶ 154 (Abrahamson dissenting) (interpretation of statute is no longer binding if the statute is subsequently amended). One must look to the current language of the statute for any limitations. There is nothing in the current version that suggests that the statute is limited to wholly intrastate commerce.

III. MICROSOFT'S ARGUMENTS ARE INCONSISTENT AND RENDER THE CASES HOPELESSLY IRRECONCILABLE.

Microsoft argues inconsistent positions. If Microsoft's strained interpretation of Wisconsin case law is accepted, it is impossible to reconcile *Pulp Wood* with two other Supreme Court cases: *State v. Allied Chemical & Dye Corp.* 9 Wis. 2d 290, 101 N.W.2d 133 (1960) and *State v. Milwaukee Braves*,

Inc., supra.[4]

Microsoft argues that *Pulp Wood* and subsequent appellate decisions, stand for the proposition that Wisconsin's antitrust statute applies to "intrastate transactions only", while federal law applies to interstate transactions. *See* Respondent's Brief, p. 4-6.[5] According to this interpretation, there is an absolute dichotomy: Federal law applies to interstate transactions; state law applies to wholly intrastate transactions.

But in *Allied Chemical,* the Supreme Court held that Wisconsin's antitrust statute would apply in a case clearly involving interstate commerce. *Allied Chemical,* 9 Wis.2d at 295-295. If, as Microsoft argues, *Pulp Wood* limited application of Wisconsin's antitrust statute to wholly intrastate commerce, *Allied Chemical* is hopelessly irreconcilable.

Microsoft attempts to distinguish *Allied Chemical* on the basis that there were anticompetitive acts alleged to have

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[4]Microsoft claims that Appellant argues that *Allied Chemical and Milwaukee Braves overruled Pulp Wood.* That is not so. Those later cases did not overrule *Pulp Wood. Pulp Wood* cannot mean what Microsoft claims it means in light of these subsequent cases, both decided before the 1980 amendments.

[5]These subsequent cases, including the recent case of *Conley Publishing v. Journal Communications,* 2003 WI 119, did not recite this proposition as a limitation on the application of Wisconsin's antitrust statute, but rather as a "mere preface to the courts' reliance on federal cases in interpreting Wisconsin antitrust law." *See Emergency One,* 23 F. Supp.2d at 962.

occurred in Wisconsin.[6] *See* Respondent's Brief, p. 11. But that argument is inconsistent with Microsoft's interpretation of *Pulp Wood* that it claims draws a clear distinction between intrastate and interstate commerce. Microsoft changes its argument and now claims that Wisconsin's antitrust statute is not limited to intrastate commerce, but would apply to interstate commerce so long as the defendant engaged in some act within the state. In so doing, Microsoft acknowledges that its primary position is not supportable.

While Microsoft asks this Court to reject the analysis in *Emergency One*, it actually adopts Judge Adelman's reasoning that Wisconsin's antitrust statute applies to interstate commerce in some situations. For Judge Adelman, the test was whether the conduct had significant impacts in the state. For Microsoft, it is whether any of the conduct occurred within this state.[7] Microsoft is forced to argue such inconsistent positions because its interpretation of *Pulp Wood* is irreconcilable with *Allied Chemical*.

Microsoft's effort to distinguish the *Milwaukee Braves* holding is similarly flawed. Microsoft argues that the court

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[6]Microsoft argues that plaintiff did not allege any of its anticompetitive acts occurred in Wisconsin. As discussed below, that is simply incorrect. Plaintiff has alleged that there were acts that occurred in Wisconsin.

[7]This sounds amazingly like the minimum contacts standard that Judge Adelman rejected.

in that case only assumed that a violation of Wisconsin law had occurred, and never actually decided whether the defendants' conduct constituted a violation. Respondent's Brief, p. 12. The *Milwaukee Braves* Court was not trying to decide if the conduct violated the statute. Rather, the Court was looking at the scope of Wisconsin's law and whether it applied to interstate commerce and, if so, whether it was preempted by the baseball exclusion. The Supreme Court was very clear that Wisconsin law would apply to interstate commerce. The fact that the *Milwaukee Braves* Court went through its analysis of state law at all, or the application of the baseball exclusion, would have been completely unnecessary if the Supreme Court had intended its holding in *Pulp Wood* to exclude application of Wisconsin law to interstate commerce.

Microsoft also tries to distinguish the *Milwaukee Braves* case on the basis that some of the "wrongful conduct took place in Wisconsin given the allegation that the defendants formulated and carried out 'a plan' to abolish 'the playing of Major League baseball games in Milwaukee.'" Respondent's Brief p. 12-13. But the decision makes no reference to any specific conduct that occurred in Wisconsin. The allegations to which Microsoft refers in that case focus on the effect of

the illegal conduct being felt in Wisconsin. This is no different than the allegation in this case that Microsoft created a monopoly in Wisconsin, and took advantage of that illegal monopoly to overcharge the citizens of this state.

The fact that the *Allied Chemical* and *Milwaukee Braves* cases dealt with issues of preemption was indicative that Wisconsin law applied to interstate commerce, because there had to be some overlap for preemption to become an issue. In a footnote, Microsoft argues that Appellant has it backwards, because preemption applies only when federal law encroaches into the state. That is an incomplete statement of the law. In fact, preemption arises in several circumstances, including the incursion of state law into an area controlled by federal law. *ARC America,* 490 U.S. at 100-101.

IV. PLAINTIFF HAS ALLEGED CONDUCT WITHIN THE STATE.

Even if this Court accepts Microsoft's argument that *Allied Chemical* requires at least some act within the state, Appellant has alleged sufficient acts. The complaint alleges that Microsoft sold its products and distributed licenses to consumers in Wisconsin, conducted extensive advertising and sales within Wisconsin, and that Wisconsin consumers were foreseeable victims of Microsoft's anticompetitive conduct and paid artificially inflated prices.

Microsoft argues that these acts of sales and marketing are to be distinguished from acts in establishing or maintaining the monopoly. But the maintenance of a monopoly within this state cannot be separated from the marketing and sales that occurred within this state. Regardless of where Microsoft formulated and implemented its plan to eliminate competition, it was directed to affect the market in this state. The allegations here are sufficient to bring Microsoft within the prohibitions of Wisconsin's antitrust statute.

V. MICROSOFT IS COLLATERALLY ESTOPPED FROM CONTESTING THE ISSUE OF THE APPLICATION OF WISCONSIN LAW.

Microsoft has already had an opportunity to litigate the application of Wisconsin's antitrust statute in the case brought by Wisconsin's Attorney General, *U.S. v. Microsoft*, 84 F. Supp.2d 9 (D.D.C. 1999) and *U.S. v. Microsoft*, 87 F. Supp.2d 30 (D.D.C. 2000) (the Federal Action). It should not be allowed to relitigate that issue here.

Microsoft cites *Harvest States Cooperatives v. Anderson*, 217 Wis.2d 154, 161 n.5, 577 N.W.2d 381 (Ct. App. 1998), for the proposition that a ruling in a federal action is not binding on this Court. Appellant does not contend that a federal ruling is binding on this Court. The issue is whether Microsoft should be given the opportunity to relitigate an issue here that it had ample opportunity to litigate in the

prior action. The fact that the prior opportunity was in a federal court rather than a state court matters not. *See Moore v. LIRC*, 175 Wis.2d 561, 499 N.W.2d 288 (Ct. App. 1993).

In deciding whether to apply issue preclusion, Wisconsin courts have developed a "fundamental fairness" standard. *Michelle T. v. Crozier*, 173 Wis.2d 681, 686, 688, 495 N.W.2d 327 (1993). In terms of application of issue preclusion, the question of fairness comes down to whether the party contesting application of the doctrine has had a "full and fair opportunity to litigate in the first action." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4423, p. 602 (2002). The redetermination of issues is usually warranted only where there is "reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation." *Montana v. U.S.*, 440 U.S. 147, 164 n. 11 (1979). Microsoft bears the burden of establishing the lack of a full and fair opportunity to litigate the claims in the Federal Action. 18A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4465, p.734-735 (2002). It must identify specific characteristics of the first trial that gave it less than a full and fair opportunity to litigate. *Id.* at 733.

Microsoft cannot meet its burden. The evidence supports

a finding that Microsoft had every incentive and the ability to fully litigate this claim in the Federal Action. Not only was the future of the company at stake, but it was common knowledge that there were a multitude of civil actions waiting in the wings. *See* Ken Auletta, World War 3.0 (2001). The parties put on 76 days of trial, including voluminous evidentiary submissions, extensive briefing and argument. All issues the parties considered germane were addressed. Microsoft also claims that the issue actually briefed was somewhat different than the issue it raised here. But issue preclusion also applies to issues that a party could have raised in a federal proceeding, but chose not to. *See* 18 Moore's Federal Practice (3d Ed.), § 133.13, p. 133-16.

The issue here is not whether the Federal Action is the final word on Wisconsin law. The question is whether Microsoft should be given an opportunity to relitigate the issue of its violation of Wisconsin's antitrust statute here where it has fully litigated that issue in the federal action and lost.

CONCLUSION

Based on the foregoing, this Court should overturn the trial court's ruling and remand with instructions to deny Microsoft's motion.

Dated at Milwaukee, Wisconsin, this 16 day of September, 2003.

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CERTIFICATION AS TO FORM AND LENGTH

I, John F. Maloney, certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of the brief is 2,749 words.

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 03-1086

GENE L. OLSTAD,
Individually and on Behalf of
All Others Similarly Situated,

Plaintiff-Appellant,

v.

MICROSOFT CORPORATION,
a foreign corporation, and
DOES 1 through 100, inclusive,

Defendant-Respondent.

ON APPEAL FROM A FINAL ORDER OF THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY KREMERS, PRESIDING
CIRCUIT COURT CASE NO. 00-CV-0003042

NONPARTY BRIEF OF THE STATE OF WISCONSIN

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NONPARTY BRIEF OF THE STATE OF WISCONSIN

INTRODUCTION

The trial court granted summary judgment against Plaintiff-Appellant Gene L. Olstad ("Olstad) and in favor of Defendant-Appellant Microsoft Corporation ("Microsoft") with regard to Olstad's claim under the Wisconsin antitrust statute, Wis. Stat. §§ 133.01 *et seq.*,

for two independent reasons: First, the court held that the statute does not apply to "bad acts" occurring within interstate commerce, regardless of their impact on Wisconsin residents. R. 83 at 18. Second, the court held that Olstad had not proved any damages, and therefore was not an adequate class representative. *Id.* at 17. The State of Wisconsin, through the Wisconsin Department of Justice (the "Department"), files this brief to assist the Court's review of the first of those reasons.

ARGUMENT

I. The Plain Language of the Wisconsin Antitrust Statute Does Not Limit its Scope to Purely Intrastate Conduct.

On its face, the Wisconsin antitrust statute prohibits "every" contract or conspiracy in restraint of trade. *See* Wis. Stat. § 133.03(1). The statute declares that "every" person who makes "any" contract or engages in "any" conspiracy in restraint of trade is guilty of a felony. *See id.* The statute expressly defines "person" to include virtually any company on the planet, and the statute plainly contemplates the prosecution of out-of-state defendants. *See* Wis. Stat. §§ 133.02(3) (defining

"person"); 133.10(3) (providing for deposition of out-of-state defendants); 133.12 (authorizing charter revocation of foreign corporations). In sum, absolutely nothing in the text of the statute – even by implication – limits its application to commerce conducted wholly within the borders of Wisconsin.

Indeed, other statutory provisions suggest exactly the opposite. For example, in setting forth the enforcement responsibilities under the state antitrust statute, the Legislature directed the Department to cooperate with federal agencies "on matters arising in *or affecting* Wisconsin which pertain to its jurisdiction." Wis. Stat. § 165.065(2) (emphasis added). By using the disjunctive "or" in that provision, the Legislature specifically contemplated that enforcement of the state's antitrust statute would involve matters "affecting" Wisconsin, even if those matters did not "arise in" Wisconsin. Thus, the statutory language strongly suggests that any limitation on the scope of the Wisconsin antitrust statute to purely intrastate conduct is not warranted.

II. Judicial Precedent Does Not Limit the Application of the Wisconsin Antitrust Statute to Purely Intrastate Conduct.

Microsoft hinges its argument on a long line of judicial opinions, each of which notes in passing that the Wisconsin antitrust statute applies only to intrastate commerce. All of those cases can be traced to an eighty-year old case from a bygone era of Commerce Clause jurisprudence, *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914) ("*Pulp Wood*"). If, as Microsoft contends, *Pulp Wood* is so important to this Court's decision, then of course this Court should look carefully at what *Pulp Wood* says – and what it does not say.

In *Pulp Wood*, a wood company sued a paper mill, seeking to offset losses sustained when a logging company that supplied the wood company went bankrupt. *Pulp Wood*, 157 Wis. at 608-12, 147 N.W. at 1060-61. The paper mill defendant moved to dismiss the complaint, arguing that the contracts between the wood company and the logging company were void, because they unlawfully restrained commerce in violation of both federal and state

antitrust law by restricting the supply of pulp wood. *Id.* at 613-15, 147 N.W. at 1062. The trial court dismissed the complaint, and the paper mill appealed to the Supreme Court. *Id.* at 613, 147 N.W. at 1062.

The Court viewed its first order of business as a choice of law between the federal and state antitrust statutes. In making this choice, the Court stated:

> The complaint shows that the wood supply furnished to the plaintiff came from the states of Wisconsin, Minnesota, and Michigan, and the Dominion of Canada. The contract we think involved interstate commerce, and if so the federal statute is applicable and the case will be treated on that basis. . . . So far as this particular case goes, we observe very little difference whether the state or federal statutes or both apply.

Pulp Wood, 157 Wis. at 615-16, 147 N.W. at 1062 (citations omitted). The Court then went on to consider the implications of the federal antitrust statute, eventually rejecting defendant's arguments. *Id.* at 616-24, 147 N.W. at 1062-66. At the end of its opinion, the Court considered whether the state antitrust statute would lead to a different result, stating:

> [The Wisconsin antitrust statute] is a copy of the federal statute, except that it applies to attempts to monopolize trade and commerce within the state and prescribes a lesser penalty for its violation than

> is provided for in the act of Congress. It originally appeared [in 1893]. Since then it has received substantially the same construction, *sub silentio* at least, that was placed on the federal law .... If the [Wisconsin antitrust] statute has any application to the facts of this case, it should receive the same interpretation that was placed on the federal act, from which it was taken, by the supreme court of the United States.

Id. at 625, 147 N.W. at 1066 (citations omitted). Having determined that state law would yield the same result, the Court reversed the trial court's dismissal of the complaint and remanded for further proceedings. *Id.*

The language quoted above represents the sum total of the Supreme Court's commentary in *Pulp Wood* on the proper scope of the Wisconsin antitrust statute. Taken in proper context, that language reflects nothing more than the Court's choice of law in a situation where either law could have applied. Notably, the Court did not say that the state law could never apply to interstate commerce, much less so in a "clear holding." Br. and App. of Defendant-Respondent Microsoft Corporation at 10. In fact, if that were the "clear holding," the Court would not have gone on to consider the affect of the Wisconsin antitrust statute on the interstate commerce at issue. But it

did, holding that the substantive result under the state statute would have been the same. *Pulp Wood*, 157 Wis. at 625, 147 N.W. at 1066 (citations omitted).

Following the remand in *Pulp Wood*, the trial court once again found against the defendant paper mill, which once again appealed the case to the Supreme Court. In this second appeal, the Court stated:

> The federal anti-trust act, known as the Sherman Act . . ., and the Wisconsin statutes bearing on the subject . . . are quoted at length in the opinion on the former appeal in the present case and it is not deemed necessary to repeat them here. *Both condemn contracts or combinations in restraint of interstate trade or commerce* as well as monopolization or attempts at monopolization of any part of such trade or commerce. . . .
>
> . . .
>
> . . . the contract in question involved interstate commerce, and hence the federal statute is the statute to be applied to the case, although little, if any, difference is to be observed in the result in the present case whether the state or the federal statutes, or both, apply.

Pulp Wood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 404-05, 170 N.W. 230, 232 (emphasis added), *cert. denied*, 249 U.S. 610 (1919). Again, this language is hardly a basis for the sweeping proposition that the Wisconsin antitrust statute can never apply to interstate commerce. Indeed, expressly to the contrary,

the Court stated that "[b]oth" the federal and state statutes "condemn contracts or combinations in restraint of interstate trade or commerce." *Id.*

Despite what the *Pulp Wood* cases actually say, they have somehow morphed into the axiomatic sources for the proposition that the Wisconsin antitrust statute cannot apply to interstate commerce. That has happened not because some other Wisconsin court in the intervening eight decades has carefully reconsidered and decided the issue. Rather, the mistaken "clear holding" of *Pulp Wood* stems simply from the rote resuscitation of dicta in a long line of cases – culminating most recently with the Supreme Court's opinion in *Conley Publishing Group v. Journal Communications*, 2003 WI 119, ¶ 16, ___ Wis. 2d ___, 665 N.W.2d 879 ("*Conley*"). *See* Br. and App. of Defendant-Respondent Microsoft Corporation at 5-6 (collecting cases).

The focus on an intrastate nexus is understandable, as there must be some effect within Wisconsin for our law to apply. But relying on the "intrastate/interstate" language from these cases as binding precedent is

misguided, because that distinction was simply irrelevant to the decision in each of those cases. Accordingly, none of them should constrain the Court's analysis here. As Chief Justice John Marshall observed long ago:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Cohens v. Virginia, 19 U.S. 264, 399 (1821). *See also Miller v. Mauston School Dist.*, 222 Wis. 2d 540, 554, 588 N.W.2d 305, 311 (Ct. App. 1998) (although the Court of Appeals is bound by decisions of the Supreme Court, Court of Appeals may nonetheless "evaluate statements in [Supreme Court] opinions on the basis of whether they constitute dictum").

In fact, when this Court looks at a pair of Supreme Court cases previously brought by the Wisconsin Attorney General, where the Court actually had occasion to consider whether interstate commerce was within the ambit of the Wisconsin antitrust statute, this Court will conclude that Supreme Court precedent does not prohibit

application of the statute to interstate commerce. To the contrary, the Court will conclude that Supreme Court precedent actually supports such application.

In *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960), the Attorney General alleged a price-fixing conspiracy against several out-of-state corporations in violation of the Wisconsin antitrust statute. The defendants argued that they sold their goods in interstate commerce, and that therefore their conduct was subject only to the federal antitrust act, which preempted application of state law. *Id.* at 292, 101 N.W.2d at 133-34. The Supreme Court held that federal law did not preempt application of the Wisconsin antitrust statute to the interstate commerce at issue. *Id.* at 295, 101 N.W.2d at 135. The import of *Allied Chemical* is unmistakable – the Wisconsin antitrust statute applies to interstate commerce. Microsoft's attempts to distinguish this as a "preemption case" are unavailing. The Department agrees with Olstad: How could preemption even be an issue if the state statute did not overlap with

the federal statute in regulating interstate commerce? Microsoft has no good answer.

Likewise, in *State v. Milwaukee Braves*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966), *cert. denied*, 385 U.S. 1044 (1967), the Department sued the National League and the owners of its respective baseball teams, alleging that they had violated the Wisconsin antitrust statute by conspiring to move the Milwaukee Braves to Atlanta. Undoubtedly, this case involved interstate commerce. A divided Court eventually held that the Wisconsin antitrust statute did not apply – but not because the conduct at issue involved interstate commerce. In fact, the Court specifically disavowed any notion that the case could be decided on that basis, stating: "The state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce . . . ." *Id.* at 721, 144 N.W.2d at 12 (citing *Allied Chemical*). Instead, the Court held that federal law created a special antitrust exemption for professional baseball, which preempted the application of state antitrust law. *Id.* at 730-32, 144 N.W.2d at 17-18. But for this specific

baseball exemption, the Court assumed that the interstate conspiracy alleged by the Attorney General would have violated the Wisconsin antitrust statute. *Id.* at 719, 144 N.W.2d at 11.

For these cases to make any sense, the Wisconsin antitrust statute simply must have applied (even before the 1980 amendment) to conduct occurring in interstate commerce. Not surprisingly, other courts that have considered and decided the precise issue in published opinions agree. *See In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618, 665-66 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (2003); *Emergency One v. Waterous Co.*, 23 F. Supp. 2d 959, 966-67 (E.D. Wis. 1998).[1]

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[1] In fact, only one published opinion has concluded otherwise in anything other than dicta. *See Maryland Staffing Services v. Manpower*, 936 F. Supp. 1494, 1504-05 (E.D. Wis. 1996). That opinion relied on the same mistaken reading of *Pulp Wood* that Microsoft advances here, however, and was expressly rejected by the same court two years later as "inconsistent with Wisconsin precedent." *Emergency One*, 23 F. Supp. 2d at 966.

III. The Wisconsin Antitrust Statute Should Apply to Conduct Occurring in Interstate Commerce if That Conduct Has a Direct, Substantial and Reasonably Foreseeable Effect on Commerce Within Wisconsin.

In this modern age, limiting the Wisconsin antitrust statute to commerce occurring wholly within this state's borders would severely limit the statute's application. Such a constrained view would directly contravene the express legislative intent that the statute "be interpreted in a manner which gives the most liberal construction to achieve the aim of competition." Wis. Stat. § 133.01. Moreover, if the statute were limited to intrastate commerce, an entire class of plaintiffs – indirect purchasers injured by an interstate conspiracy – would be denied relief under both federal and state law. That, too, would run directly contrary to legislative intent: Our state Legislature specifically amended the antitrust statute in 1980 to ensure that indirect purchasers could recover under our state law after the United States Supreme Court decided that they could not obtain relief under federal law. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977). The Supreme Court subsequently upheld such

laws as a valid exercise of state power. *See California v. ARC America Corp.*, 490 U.S. 93, 101-03 (1989). (upholding national class action prosecuted under state antitrust laws, noting: "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies").

Microsoft itself seems to concede that applying the Wisconsin antitrust statute only to intrastate commerce is untenable. After arguing throughout its brief that the statute does not apply to interstate commerce at all, Microsoft in the end proposes a standard (without citation to any authority) whereby the statute should not apply if the conduct "predominantly" affects interstate commerce. Br. and App. of Defendant-Respondent Microsoft Corporation at 36. Of course, this standard would in fact allow the statute to apply to conduct occurring in interstate commerce, so long as the "predominant" effect of that conduct occurred within Wisconsin. As outlined below, the Department proposes a different standard.

The reach of the Wisconsin antitrust statute cannot be limitless. Principles of comity and federalism constrain

the degree to which our Legislature may permissibly regulate conduct beyond Wisconsin's borders. *See Emergency One*, 23 F. Supp. 2d at 968.[2] In much the same fashion, principles of comity and international law constrain the application of the Sherman Act to conduct occurring beyond the borders of the United States. In 1982, Congress codified these limiting principles in a section of the Foreign Trade Antitrust Improvements Act ("FTAIA"). *See* Pub. L. No. 97-290, § 402, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 6a). The FTAIA provides that the Sherman Act shall not apply to conduct involving foreign commerce unless that conduct has "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. *See* 15 U.S.C. § 6a(1)(A).

---

[2] The state can criminally prosecute a defendant for conduct outside Wisconsin so long as the person acted with the intent to "cause in this state a consequence" prohibited by a criminal statute. *See* Wis. Stat. § 939.03(1)(c). For civil cases, a similar standard appears in the Wisconsin long-arm statute. *See* Wis. Stat. § 801.05(4). The Wisconsin antitrust statute does not limit these legislative decrees in any fashion, which certainly supports the proposition that its scope is not limited to intrastate conduct. Those other statutes govern personal jurisdiction over the defendant, however, which is a slightly different inquiry than whether the antitrust statute may legitimately regulate the defendant's conduct in the first place. This latter inquiry is what the Court confronts on this appeal. *See Emergency One*, 23 F. Supp. 2d at 968-69

Given that the extraterritorial limitations imposed by the FTAIA are directly analogous to the issue before this Court, the Department urges the Court to adopt the standard set forth in the FTAIA. *See Conley*, 2003 WI 119, ¶¶ 17-20, ___ Wis.2d at ___, 665 N.W.2d at 885-87 (explaining why Wisconsin courts should interpret our antitrust law consistent with federal antitrust law).[3] The Court should hold that the Wisconsin antitrust statute applies to conduct occurring in interstate commerce, so long as that conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within Wisconsin.[4]

(distinguishing between personal jurisdiction and legislative jurisdiction).

[3] The *Conley* Court noted that the uniform treatment of federal and state antitrust law minimizes the chance that a Wisconsin business will be subject to different liability for the "same conduct," *Conley*, 2003 WI 119, ¶ 20, ___ Wis.2d at ___, 665 N.W.2d at 887, thus acknowledging the overlap between the interstate commerce regulated by both federal and Wisconsin antitrust law.

[4] In determining whether the effect is "substantial," the Court should not do so in relative terms. For example, in the Department's view, any impermissible restraint of trade that resulted in higher prices paid by Wisconsin consumers would be both a "direct" and "substantial" effect.

CONCLUSION

For the foregoing reasons, the Department respectfully urges this Court to adopt a legal standard in interpreting the Wisconsin antitrust statute that applies that statute to conduct occurring in interstate commerce if that conduct has a direct, substantial and reasonably foreseeable effect on commerce within Wisconsin.

Dated this 10th day of October, 2003.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,994 words.

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CASE NO. 00-CV-003042**

BRIEF OF DEFENDANT-RESPONDENT MICROSOFT CORPORATION IN REPLY TO NONPARTY BRIEF OF THE STATE OF WISCONSIN

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936 F. Supp. 1494 (E.D. Wis. 1996) 6

Standard Oil Co. v. *United States*,
221 U.S. 1 (1911) 2

740 Ill. Comp. Stat. 10/7.9 (2002) 5

21 Cong. Rec. 2456 (1890) 4

ARGUMENT

The State of Wisconsin argues that the plain language of Wisconsin's antitrust statute shows that it is not limited to intrastate transactions, and that the Wisconsin Supreme Court's decisions to the contrary should be rejected.

The State is incorrect.

I. The "Plain Language" of Wisconsin's Antitrust Statute Does Not Support the State's Position.

The "plain language" of Wisconsin's antitrust statute is itself of no help in ascertaining its jurisdictional limits since, as the State concedes, "[t]he reach of the Wisconsin antitrust statute cannot be limitless" and its "plain language" contains no limit. State Br. at 14. Rather, the language of the statute must be read in combination with the interpretation given it by Wisconsin's highest court, which has consistently stated that "the scope of Chapter 133 is limited to intrastate transactions." *Conley Publishing Group Ltd.* v. *Journal Communications, Inc.*, 2003 WI 119, ¶ 16, 665 N.W. 2d 879, 885 (2003); *see also Grams* v. *Boss*, 97 Wis. 2d 332, 346, 294 N.W. 2d 473, 480 (1980); *John Mohr & Sons, Inc.* v. *Jahnke*, 55 Wis. 2d 402, 410, 198 N.W. 2d 363, 367 (1972); *Reese* v. *Associated Hospital Service, Inc.*, 45 Wis. 2d 526, 532, 173

N.W. 2d 661, 664 (1970); *Pulp Wood Co.* v. *Green Bay Paper & Fiber Co.*, 157 Wis. 604, 625, 147 N.W. 1058, 1066 (1914). Of course, judicial interpretations of antitrust statutes are common -- for instance, the statute prohibits "[e]very" contract or conspiracy in restraint of trade, yet for nearly a century, federal and state courts have unanimously held that only unreasonable restraints are prohibited. *See, e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60-70 (1911). And this Court is bound by such interpretations. *Cook* v. *Cook*, 208 Wis. 2d 166, 189, 560 N.W. 2d 246, 256 (1997).

Furthermore, our Supreme Court's longstanding interpretation is in no way contradicted by Wis. Stat. § 165.065(2). That statute supports the intrastate limitation, for it provides that "[t]he [Wisconsin] assistant attorney general in charge of antitrust investigations and prosecutions is to cooperate actively with the antitrust division of the U.S. department of justice in everything that concerns monopolistic practices *in Wisconsin*. . . ." (Emphasis added). The portion of § 165.065(2) quoted out of context by the State should be read as *limiting* jurisdiction, not expanding it: the Attorney General should cooperate with the Federal Trade Commission ("FTC") -- but only "on matters arising in or

affecting Wisconsin which pertain to its jurisdiction" where "its" refers to the FTC, *not* the Attorney General.

II. *Pulp Wood* And Its Progeny Are Clear And Controlling.

First, Pulp Wood says: "[The Wisconsin antitrust statute] is a copy of the federal statue, except that it applies to attempts to monopolize trade and commerce *within the state*. . . ." *Pulp Wood Co.*, 157 Wis. at 625 (emphasis added). The State nevertheless argues that the Court's discussion "reflects nothing more than the Court's choice of law in a situation where either law could have applied." State Br. at 6. This is clearly wrong. The Court did not say that either statute could apply; rather, the Court stated that "[t]he contract we think involved interstate commerce, *and if so the federal statute is applicable*." *Pulp Wood*, 157 Wis. at 615 (emphasis added). And when the case returned after remand, the Court reiterated "the principles of law then laid down": "The contract in question involved *interstate* commerce, and *hence* the federal statute is *the* statute to be applied to the case. . . ." *Pulp Wood Co.* v. *Green Bay Paper & Fiber Co.*, 168 Wis. 400, 404, 170 N.W. 230, 232 (1918) (emphasis added).

Second, the State argues that *Pulp Wood* is "from a bygone era of Commerce Clause jurisprudence." State Br. at 4. This only supports the circuit court's decision. Certainly the Legislature's intent when it enacted the statute in 1893 was consistent with the jurisprudence of the time. Indeed, as Senator Sherman explained, this is the very reason that Congress enacted the Sherman Act: "Each State can and does prevent and control combinations *within the limit of the State*." 21 Cong. Rec. 2456, 2460 (1890) (emphasis added).

And a subsequent change in Commerce Clause jurisprudence does not give courts license to rewrite a statute. As a federal court recently held when interpreting a similar Mississippi statute enacted in 1900, the issue "is not whether today the State of Mississippi could constitutionally enact legislation that prohibits interstate anticompetitive conduct," but rather "whether the legislature intended to do so when it enacted the" state's antitrust act. *In re Microsoft Corp. Antitrust Litigation*, MDL No. 1332, 2003 WL 22070561, *2 (D. Md. Aug. 22, 2003) (emphasis added). Thus, as the Alabama Supreme Court recently held in interpreting Alabama's antitrust statutes of the same era, only the legislature can expand the statutes' reach:

> [T]hese statutes regulate monopolistic activities that occur "within this state" -- within the geographic boundaries of this state -- even if such activities fall within the Commerce Clause of the Constitution of the United States. We leave to the Legislature the policy decision of whether to expand the reach of Alabama's antitrust statutes to activities that cross state boundaries.

Archer Daniels Midland Co. v. *Seven-up Bottling Co.*, 746 So. 2d 966, 989-90 (Ala. 1999). Although some state legislatures have done that, *see*, *e.g.*, 740 Ill. Comp. Stat. 10/7.9 (2002), the Wisconsin Legislature has not.

Third, contrary to the State's assertion, State Br. at 8-9, though the Court's holding in *Pulp Wood* may not have been decisive of the controversy before the Court, that does not render that plain holding *dictum*:

> "[W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy [before it], such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision."

Gillen v. *City of Neenah,* 219 Wis. 2d 806, 825 n.11, 580 N.W. 2d 628, 635 n.11 (1998). In *Pulp Wood*, the Court held that the federal statute applied because the contract involved interstate commerce. *Pulp Wood*, 157 Wis. at 615. When the case returned after remand, the Court characterized its earlier

pronouncements as "the principles of law then laid down." *Pulp Wood*, 168 Wis. at 404.

Indeed, earlier this year in *Conley Publishing*, the Supreme Court confirmed its holding in *Pulp Wood* by attributing "[t]he dearth of state antitrust precedent" to the fact that "the scope of Chapter 133 is limited to intrastate transactions." 2003 WI 119, ¶ 16. And the State concedes that the application of the *Pulp Wood* principle was not *dictum* in *Maryland Staffing Services, Inc.* v. *Manpower, Inc.*, 936 F. Supp. 1494, 1504-05 (E.D. Wis. 1996). State Br. at 12 n.1. Notably, the *Maryland Staffing* decision was written by Judge Warren, who had been the Attorney General of Wisconsin before taking the bench.

Fourth, the State mischaracterizes *State* v. *Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W. 2d 133 (1960), and *State* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1 (1966). According to the State, the holding in *Allied Chemical* was "that federal law did not preempt application of the Wisconsin antitrust statute to the interstate commerce at issue." State Br. at 10. What *Allied Chemical* actually says is that "[t]here is no language in the federal enactments . . . that precludes the states from enacting

effective legislation dealing with such unlawful practices [conspiracies and monopolies]" and that "[t]he Wisconsin statutes make no attempt to regulate or burden interstate commerce." 9 Wis. 2d at 295. Given the allegation "that some of the acts by defendants in furthering [the] combination and conspiracy *were performed by them in the state of Wisconsin*," *id.* at 291 (emphasis added), there is no inconsistency between *Allied Chemical* and *Pulp Wood*; when such acts occur in Wisconsin, the state statute applies, even if the federal statute might also apply.[1]

The same is true for *Milwaukee Braves*: The "interstate conspiracy" alleged in that case included conduct that "ha[d] for thirteen years *reached into Wisconsin*" and "involve[d] activity within Wisconsin." 31 Wis. 2d at 713, 720 (emphasis added).

III. Microsoft's Position Is Consistent With *Pulp Wood* And Its Progeny.

Finally, Microsoft has consistently stated that Wisconsin's antitrust act does not apply to out of state

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[1] The State wonders "[h]ow could preemption even be an issue if the state statute did not overlap with the federal statute." State Br. at 10-11. Microsoft answered this question in its earlier brief: It is when the federal government regulates *intrastate* activity that the preemption doctrine is implicated. Def. Br. at 10 n.3.

conduct that predominantly affects interstate commerce. Contrary to the State's suggestion, State Br. at 14, this is consistent with all of the appellate decisions, including *Allied Chemical* and *Milwaukee Braves*, and with the circuit court's decision in this case: "[W]hatever Microsoft has been accused of or found to have done wrong by Judge Jackson [in the government action], did not occur, in my view, in Wisconsin. . . . The bad acts didn't occur here and I think they have to, to bring a claim under Wisconsin anti-trust law." (R. 88 at p. 18.)

Dated this 21st day of October, 2003.

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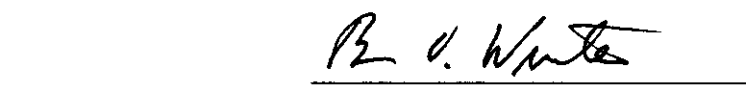
By:



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) and with the Court's order of September 29, 2003 for a brief produced with a proportional serif font.

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